

**BEFORE THE  
NATIONAL LABOR RELATIONS BOARD**

In the Matter of:	)	
	)	
CONSUMER'S COOPERATIVE ASSOCIATION	)	
OF EAU CLAIRE,	)	
	)	
Respondent,	)	
	)	
and	)	Case 18-CA-16902
	)	
UNITED FOOD AND COMMERCIAL	)	
WORKERS #12A, A/W UNITED FOOD AND	)	
COMMERCIAL WORKERS INTERNATIONAL	)	
UNION,	)	
	)	
Charging Party.	)	

The above entitled matter came on for hearing pursuant to notice, before THE HONORABLE JANE VANDEVENTER, Administrative Law Judge, at Room 20, Federal Building and U.S. Courthouse, 500 South Barstow, Eau Claire, Wisconsin, on Tuesday, September 30, 2003, at 9:00 a.m.

WALLS & WALLS  
12124 Hampshire Avenue North  
Champlin, Minnesota 55316  
(763) 422-8938

1                                    A P P E A R A N C E S

2

3    **On Behalf of the General Counsel:**

4            SANDRA FRANCIS, ESQ.  
5            Region 18  
6            National Labor Relations Board  
7            Suite 790  
8            330 Second Avenue South  
9            Minneapolis, Minnesota 55401

10

11   **On Behalf of the Charging Party:**

12            (None except as a witness.)

13

14   **On Behalf of the Respondent:**

15            STEPHEN L. WELD, ESQ.  
16            PAMELA MACAL, ESQ.  
17            Weld, Riley, Prenn & Ricci  
18            3624 Oakwood Hills Parkway  
19            Eau Claire, Wisconsin 54702

20

21   **Also Appearing:**

22

23

WALLS & WALLS  
12124 Hampshire Avenue North  
Champlin, Minnesota 55316  
(763) 422-8938

1		<u>I N D E X</u>				
2						VOIR
3	<u>WITNESSES</u>	<u>DIRECT</u>	<u>CROSS</u>	<u>REDIRECT</u>	<u>RECROSS</u>	<u>DIRE</u>
4	Daniel Hudyma	12	48	56		
5						
6	Brick Hopkins	58	66	68	70	
7						
8	Kelly Clarke	72	86	95		
9						
10	Bill Ripley	96	102			
11						
12						

WALLS & WALLS  
 12124 Hampshire Avenue North  
 Champlin, Minnesota 55316  
 (763) 422-8938

1	<u>E X H I B I T S</u>		
2	<u>EXHIBIT</u>	<u>IDENTIFIED</u>	<u>IN EVIDENCE</u>
3	<b>General Counsel's</b>		
4			
5	<b>1(a) through 1(f)</b>		7
6			
7	<b>2</b>		13
8			
9	<b>3</b>		17
10			
11	<b>4</b>		18
12			
13	<b>5</b>		18
14			
15	<b>6</b>		19
16			
17	<b>7</b>		30
18			
19	<b>8</b>		33
20			
21	<b>9</b>		35
22			
23	<b>10</b>		40
24			
25	<b>11</b>		40
26			
27	<b>12</b>		42
28			
29	<b>13</b>		43
30			
31	<b>14</b>	44 and 47	
32			
33	<b>15</b>		47
34			
35	<b>16</b>		47
36			
37	<b>17</b>		91
38			
39	<b>Respondent's</b>		
40			
41	<b>1</b>		86
42			
43	<b>2</b>		102
44			
45			

WALLS & WALLS  
12124 Hampshire Avenue North  
Champlin, Minnesota 55316  
(763) 422-8938

P R O C E E D I N G S

1 JUDGE VANDEVENTER: Good morning.

2 The hearing will be in order.

3 This is a formal trial before the National Labor Relations  
4 Board in Consumer's Cooperative Association of Eau Claire, case  
5 18-CA-16902.

6 The administrative law judge presiding is Jane Vandeventer.  
7 I am located in the Washington office of the Division of Judges.

8 Any communications post-trial or necessary during trial  
9 should be addressed to that office and any requests for  
10 extensions of time or other matters should be addressed to the  
11 chief judge or the deputy chief judge in Washington.

12 Will counsel and other representatives of the parties  
13 please state their appearances for the record?

14 For the General Counsel?

15 MS. FRANCIS: For the General Counsel Sandra C. Francis,  
16 NLRB Region 18, Minneapolis, Minnesota.

17 JUDGE VANDEVENTER: And is there a representative - is the  
18 Charging Party going to make an appearance?

19 MS. FRANCIS: No.

20 JUDGE VANDEVENTER: Okay, and for the employer - the  
21 Respondent?

22 MR. WELD: Weld, Riley, Prenn & Ricci by Stephen L. Weld  
23 and Pamela Macal.

24 JUDGE VANDEVENTER: I'm sorry, Ms. Macal's name is not  
25 listed on here. Could I get a spelling on that?

WALLS & WALLS  
12124 Hampshire Avenue North  
Champlin, Minnesota 55316  
(763) 422-8938

1 MS. MACAL: M-A-C-A-L.

2 JUDGE VANDEVENTER: Pamela?

3 MS. MACAL: Correct.

4 JUDGE VANDEVENTER: Thank you.

5 As I stated a few minutes ago off the record I would like  
6 the parties to bear in mind that as the trial proceeds and in  
7 light of the fact that - I also mentioned before opening the  
8 record that my intention in this case is to issue a bench  
9 decision and proud developments sometimes may affect a party's  
10 perception of the likelihood of settlement or the ability to  
11 arrive at a new resolution, a resolution that wasn't put up  
12 previously. Anyway that means that the parties should ask, if  
13 they see such a possibility, me for time off the record and I  
14 will grant that time if there are settlement negotiations that  
15 can be pursued productively. And I may remind you again about  
16 settlement but please bear in mind that I will be attentive to  
17 the needs of the parties for settlement discussion time if that  
18 possibility arises.

19 In this courtroom which we are borrowing there will be no  
20 smoking, eating or drinking other than water and please turn off  
21 all cell phones and pagers if you have such with you.

22 Now, Ms. Francis, do you have formal papers for us?

23 MS. FRANCIS: Yes, I offer into evidence the formal papers.  
24 They are marked as General Counsel Exhibit 1(a) through 1(f),  
25 1(f) is an index and description of the formal papers and they  
26 have previously been shown to all parties.

WALLS & WALLS  
12124 Hampshire Avenue North  
Champlin, Minnesota 55316  
(763) 422-8938

1 JUDGE VANDEVENTER: Any objection, Mr. Weld?

2 MR. WELD: No objection, Judge.

3 JUDGE VANDEVENTER: The formal papers are received.

4 (EXHIBIT RECEIVED: GENERAL COUNSEL'S NOS. 1(a) THROUGH 1(f)  
5 INCLUSIVE.)

6 JUDGE VANDEVENTER: Are there any preliminary matters that  
7 either party wishes to raise, for example, documents that might  
8 be stipulated or any other preliminary matters that we can deal  
9 with at this time?

10 MS. FRANCIS: None for the General Counsel.

11 MR. WELD: No, Judge.

12 JUDGE VANDEVENTER: Okay. Then, Ms. Francis, I do like a  
13 short opening statement from each party to just set out what you  
14 are intending to prove. Ms. Francis?

15 MS. FRANCIS: Your Honor, the complaint alleges Respondent  
16 violated the Act by refusing to execute a collective bargaining  
17 agreement by conditioning the execution on the inclusion of a  
18 letter of agreement not agreed to by the parties during  
19 negotiations. Most of the relevant facts are not disputed. It  
20 is undisputed that the Union and the Respondent have a long  
21 standing bargaining relationship spanning approximately 35 years  
22 and the parties most recent collective bargaining agreement  
23 expired on March 31st. It is further undisputed that the  
24 parties began negotiating a successor collective bargaining  
25 agreement in March and came to an agreement on May 1st.

26 The instant dispute centers around the inclusion of a

1 letter of agreement which modifies the language of the  
2 recognition clause of the contract found in Section 1.1(b).  
3 Again there is no dispute that the parties entered into the  
4 letter of agreement in 2001. There is also no dispute that the  
5 letter of agreement was not discussed at any of the first three  
6 bargaining sessions. It is further undisputed that the letter  
7 of agreement was not attached to any of the drafts of the  
8 contract Respondent sent to the Union but appeared for the first  
9 time in the final contract signed by Respondent and received by  
10 the Union in June.

11 The only facts disputed evolve a very brief sidebar  
12 conversation between Mr. Hudyma of the Union and Ms. Clarke of  
13 Respondent on May 1st at the close of the negotiation session.  
14 It is during this conversation that Respondent contends parties  
15 specifically agreed to include the letter of agreement and the  
16 Union denies any such agreement or that it was even discussed.  
17 The facts will support a finding that Mr. Hudyma's recollection  
18 of the brief sidebar conversation is accurate and the letter of  
19 agreement was not discussed and is not part of the current  
20 collective bargaining agreement that the parties agreed to on  
21 May 1st.

22 JUDGE VANDEVENTER: Thank you, Ms. Francis.  
23 Mr. Weld?

24 MR. WELD: Yes, Judge. The Respondent has been charged  
25 with bad faith bargaining, failure to execute an agreement in  
26 this case, despite what we believe is a clear understanding and



1 agreement in a sidebar conversation between our chief  
2 spokesperson, Kelly Clarke, and Mr. Hudyma, the union  
3 representative. The agreement occurred during a mediation  
4 session conducted under the auspices of the Federal Mediation  
5 and Conciliation Service. The Union's position in the  
6 negotiations was that there would be no new addendums attached  
7 to the contract - to the new contract which would cover the  
8 period 2003 forward. The parties had a sidebar conversation for  
9 the express purpose of determining what the existing addenda  
10 were and the existing addenda included a letter of agreement  
11 which had been executed in January of 2001.

12 As a bit of background for the Judge's benefit the parties  
13 are coming off of a five year agreement covering the period 1998  
14 through 2003. In mid-contract term the parties agreed to  
15 renegotiate the wages. As a result of that renegotiations the  
16 employer increased the wages which had been set out as part of  
17 the five year agreement and in exchange for that the Union  
18 agreed to paragraph five which called for a modification of a  
19 recognition clause which indicated that the Union was  
20 automatically to be recognized as the representative of any new  
21 facilities owned by the store in Eau Claire or Chippewa Counties  
22 in Wisconsin.

23 The sidebar agreement specifically addressed that paragraph  
24 five. It was specifically addressed in that conversation  
25 because the Respondent had purchased a store in Chippewa Falls  
26 in Wisconsin in the period after the letter of agreement had

1 been entered into. The parties engaged in litigation regarding  
2 the significance of that letter of agreement. In the period  
3 between 2001 and 2003 the letter of agreement was an essential  
4 aspect of the negotiated settlement just as the wage grid which  
5 was attached to the letter of agreement was the base for the  
6 negotiated wage increase for the period 2003 forward.

7 The letter of agreement was specific. Ms. Clarke  
8 specifically circled the paragraph. Mr. Hudyma indicated he was  
9 not concerned or advised that he was not concerned about that  
10 paragraph but rather was concerned about another paragraph in a  
11 different memorandum of understanding which had been attached to  
12 the five year agreement. There was a specific and clear  
13 agreement that the - in that sidebar conversation that the  
14 letter agreement should be attached to the new contract. The  
15 employer did fail to attach the letter of agreement to its  
16 initial drafts of the document that was attributable to a  
17 failure to have a file copy on our computer which referenced the  
18 sidebar which was engaged or negotiated during the term of the  
19 five year agreement. And indeed the letter that was attached -  
20 or the contract which was sent to Mr. Hudyma initially was  
21 actually the 1992 draft of the collective bargaining agreement.  
22 The employer did acknowledge its error in sending the wrong  
23 draft but it's clear that Mr. Hudyma and the Union are using a  
24 clerical error - a scrivener's error as an attempt to modify the  
25 terms of the negotiated agreement. It is not the employer who  
26 has failed to execute the agreement. It's the Union. And

1 therefore we don't believe that charges are appropriate here.

2 JUDGE VANDEVENTER: Thank you. I may have other questions.  
3 I think I have got the general idea but if I have other  
4 questions, I will address them to counsel as the trial  
5 progresses.

6 Anything else preliminary before we proceed with evidence?

7 MS. FRANCIS: Nothing for the General Counsel.

8 JUDGE VANDEVENTER: Then let's proceed. Ms. Francis?

9 MS. FRANCIS: General Counsel calls Daniel Hudyma.

10 (WITNESS SWORN: DANIEL HUDYMA.)

11 JUDGE VANDEVENTER: State your name and spell it so the  
12 reporter can get it correctly.

13 THE WITNESS: My name is Dan Hudyma. The last name is  
14 spelled H-U-D-Y-M-A.

15 JUDGE VANDEVENTER: And Mr. Hudyma bearing in mind that  
16 this is an old courtroom and although improved it's still not  
17 perfect if you could keep your voice up as much as possible it  
18 would aid all parties, including myself, in hearing your  
19 testimony. Thank you.

20 DIRECT EXAMINATION

21 Q BY MS. FRANCIS: Mr. Hudyma, where are you employed?

22 A I work for United Food and Commercial Workers Local 12A.  
23 Our office is in Duluth, Minnesota

24 Q And what is your position with the United Food and  
25 Commercial -

26 A I am the president of the labor union.

WALLS & WALLS  
12124 Hampshire Avenue North  
Champlin, Minnesota 55316  
(763) 422-8938

1 Q President?

2 And can you tell me what that job entails briefly?

3 A Just about everything involved in the union from  
4 negotiating contracts, grievance filing, arbitration,  
5 organizing.

6 Q And how long have you held that position?

7 A Four years in July.

8 Q And what is the union's relationship with Respondent?

9 A We have had a contract with the Eau Claire Consumer Co-op  
10 from sometime in the 1960's until present and in the Eau Claire  
11 area we have - represent some of the employees in two of the  
12 grocery stores. I think there is nine convenience stores - two  
13 lubs -

14 Q That's all with Respondent?

15 A Yes.

16 Q Okay. And how long have you personally worked on that  
17 account?

18 A Four years.

19 Q When did the most recent contract expire?

20 A That contract expired March 31st of 2003.

21 MS. FRANCIS: I have handed you what has been marked as  
22 General Counsel Exhibit 2.

23 (Witness proffered document.)

24 Q Is this the most recent collective bargaining agreement?

25 A Yes, it is.

26 MS. FRANCIS: I offer General Counsel Exhibit 2.

1 JUDGE VANDEVENTER: Any objection?

2 MR. WELD: No objection.

3 JUDGE VANDEVENTER: General Counsel 2 is received.

4 (EXHIBIT RECEIVED: GENERAL COUNSEL'S NO. 2.)

5 Q BY MS. FRANCIS: Now when did negotiations start for the  
6 successor contract to this one?

7 A I believe the first negotiation meeting was on the 14th of  
8 March.

9 Q And were you involved in the negotiation session?

10 A Yes. Yes, I do all the negotiations for all the contracts.

11 Q Who else represented the Union at these sessions?

12 A Besides some of our union stewards I left the - I left it  
13 open to whoever wanted to be at the contract negotiations. So  
14 the size of the negotiating committee varied anywhere from five  
15 to I think at our largest meeting we had close to 50 employees  
16 of Eau Claire Consumer Co-op that were there.

17 Q And do you know who represented Respondent in negotiations?

18 A Yes.

19 Q And who was that?

20 A We have Kelly Clarke, Bill -

21 Q And what is her title?

22 A Human Resource Director. Bill Ripley - he is the store  
23 manager at Mega East. Brick Hopkins. I think - I don't know  
24 Brick's title. I think at the first meeting Sue Mueller was  
25 there and I am not sure of Sue's title either. She works at  
26 Mega West. And Jeff Julson. I believe he is the manager of the

1 convenient stores and lubes.

2 Q Okay. Do you know how many sessions did you have?

3 A Four.

4 Q Do you know the dates of those sessions?

5 A I think it was March 14th, March 19th, April - I forgot the  
6 date in April.

7 MR. WELD: The employer would stipulate that there was a  
8 bargaining session on April 10th and on May 1st.

9 MS. FRANCIS: is that correct?

10 THE WITNESS: That's correct.

11 JUDGE VANDEVENTER: So stipulated Ms. Francis?

12 MS. FRANCIS: Yes.

13 JUDGE VANDEVENTER: Stipulation is received.

14 Q BY MS. FRANCIS: And did you exchange proposals in these -  
15 any of these meetings?

16 A The very first meeting we were exchanged our - we exchanged  
17 proposals.

18 (Pause.)

19 Q I have handed you three packets of documents. They have  
20 been marked as General Counsel's Exhibit 3, General Counsel's  
21 Exhibit 4, and General Counsel's Exhibit 5. Do you see where  
22 the markings are?

23 (Witness proffered documents.)

24 A Yes.

25 Q If you could first look at General Counsel's Exhibit 3.  
26 Can you tell me what is that?

1 A This is the contract proposal for contract language that  
2 the Union, myself, including employees of Consumer Co-op,  
3 worked on over a year's time and that's our draft.

4 Q Okay, and did you give this to Respondent?

5 A This is the draft that we gave to the Company at the first  
6 negotiation meeting.

7 Q Okay, and in your proposal did you propose any changes to  
8 the recognition clause or specifically Section 1.1(b)?

9 A Yes, actually in this contract we went through and  
10 clarified and changed it rather drastically.

11 Q And can you point out any particular change to the  
12 recognition or the clauses at issue?

13 A Well, the recognition clause in this - in our proposal we  
14 used some of the same language although we changed the - our  
15 proposal for recognition was that the employer - this agreement  
16 does apply to the employer's operations as performed under this  
17 agreement and this contract and the union representation  
18 hereunder shall also extend to any extension, expansion, or  
19 relocation of such present operation now represented by the  
20 union local in the geographic area of the jurisdiction that is  
21 covered under the charter of the union local. So, basically our  
22 proposal was to expand the recognition clause.

23 Q Did your proposal include or indicate or reference any of  
24 the memorandums of understanding that were attached to the  
25 agreement in 1998?

26 A One of the letters of understanding we incorporated that

1 into the recognition clause.

2 Q And which one was that?

3 A And that was the letter of understanding concerning the --  
4 how hours are scheduled.

5 Q And does that have to do with seniority?

6 A Yes. It's -

7 Q Did you want to explain?

8 A Well, that carries us onto further. We have it here but  
9 actually that's - we did go back and put it in the seniority  
10 section. This -

11 Q At a later date?

12 A Yes.

13 Q Okay.

14 MS. FRANCIS: General Counsel offers General Counsel's  
15 Exhibit 3.

16 MR. WELD: No objection.

17 JUDGE VANDEVENTER: No objection?

18 MR. WELD: No objection.

19 JUDGE VANDEVENTER: 3 is received.

20 (EXHIBIT RECEIVED: GENERAL COUNSEL'S NO. 3.)

21 Q BY MS. FRANCIS: And do you - look at the packet marked  
22 General Counsel Exhibit 4 and can you explain what this is?

23 A This is the contract proposal presented to the union by the  
24 employer.

25 Q And the handwriting on that document, what is that?

26 A That's my handwriting -- my question marks - because that



1 is not the language that's in our current contract.

2 Q When you say "that is not", are you referring to 1.1(b)?

3 A 1.1(b) - that is correct. That language is language that  
4 was in the pre '98 contract.

5 Q And does this proposal reference any of the memorandums of  
6 understanding or the letter of agreement from 2001?

7 A No.

8 Q And you said that the language in 1.1(b) is from the  
9 contract prior to the 1998 contract?

10 A Prior to the 1998 contract. That's correct.

11 Q Any other changes that you recognized on that section -  
12 1.1(b)?

13 A Well, the dates are wrong and in that language - the  
14 language in the 1998 contract included Chippewa County as well  
15 as the Eau Claire County.

16 MS. FRANCIS: General Counsel offers General Counsel  
17 Exhibit 4.

18 MR. WELD: No objection.

19 JUDGE VANDEVENTER: 4 is received.

20 (EXHIBIT RECEIVED: GENERAL COUNSEL'S NO. 4.)

21 Q BY MS. FRANCIS: During the meetings in which you exchanged  
22 proposals did the parties discuss Section 1.1(b)?

23 A No.

24 Q Did the parties discuss the 2001 letter of agreement?

25 A No.

26 Q And if you could just turn then to General Counsel Exhibit

1 5 - that smaller packet - and what - can you explain what this  
2 is?

3 A This is the union's response to the company's proposal.

4 Q And did you give this proposal to Respondent?

5 A Yes.

6 MS. FRANCIS: General Counsel offers General Counsel  
7 Exhibit 5.

8 MR. WELD: No objection, Judge.

9 JUDGE VANDEVENTER: Exhibit 5 is received.

10 (EXHIBIT RECEIVED: GENERAL COUNSEL'S NO. 5.)

11 Q BY MS. FRANCIS: And does the General Counsel's Exhibit 5,  
12 the union's response, reference any of the memorandums of  
13 understanding?

14 A No, it does not.

15 Q Does it reference the letter of agreements from 2001?

16 A No.

17 Q And does it reference Section 1.1(b)?

18 A No.

19 Q I have handed you what has been marked as General Counsel's  
20 Exhibit 6. Would you please explain what this document is?  
21 (Witness proffered document.)

22 A This was a letter from the -- or an e-mail from the  
23 company. I can't remember which one it was - because we did  
24 lots of e-mails. This is our response - company's proposal and  
25 the union's response to - and things that we had - could agree  
26 on from our first two meetings.

WALLS & WALLS  
12124 Hampshire Avenue North  
Champlin, Minnesota 55316  
(763) 422-8938

1 Q So this is not a document you put together?

2 A No, it's not.

3 Q But you received it from Respondent?

4 A Yes.

5 MS. FRANCIS: General Counsel offers General Counsel

6 Exhibit 6.

7 MR. WELD: No objection, Judge.

8 JUDGE VANDEVENTER: Six is received.

9 (EXHIBIT RECEIVED: GENERAL COUNSEL'S NO. 6.)

10 JUDGE VANDEVENTER: Let me ask you one thing now. I didn't  
11 hear a date. Do we have a date? Or is there a date on the  
12 document?

13 Q BY MS. FRANCIS: Do you recall the date that you received  
14 this?

15 JUDGE VANDEVENTER: There is a date on the second page. I  
16 don't know if it's the - it's a little obscured, but there is a  
17 date in the upper left-hand corner.

18 Q BY MS. FRANCIS: On the fax?

19 A The fax of March 30th.

20 Q And is that the date you received it?

21 A Yes.

22 Q This document, which is General Counsel's Exhibit 6, it's  
23 titled "Company Proposal", but I see it has also your response  
24 on that.

25 Anywhere in this document is there any reference to Section  
26 1.1(b)?

1 A No, no.

2 Q Is there any reference to any of the memorandums of  
3 understanding?

4 A No.

5 Q Any reference to the 2001 letter of agreement?

6 A No.

7 Q During the March meeting -- there were two meetings in  
8 March, is that right?

9 A That is correct.

10 Q During either of those meetings did the parties discuss any  
11 changes to Section 1.1(b)

12 A No.

13 Q Did the parties discuss the 2001 letter of agreement?

14 A No.

15 Q Did the parties discuss the memorandums of understanding  
16 that were attached to the 1998 contract?

17 A No.

18 Q I believe that we stipulated that there was also a meeting  
19 on April 10th. Do you recall what was discussed at that  
20 meeting?

21 A At that meeting we -- we tried to negotiate from our two  
22 previous proposals, but at that point the mediator, Jose  
23 Rosario, it was his thought that we should narrow our  
24 negotiation down to five more manageable items because of the  
25 differences we had within our tow -- because of our two  
26 proposals.

1 Q And did you do that?

2 A Yes, we did.

3 Q And what five items did you narrowed it to?

4 A We narrowed it down to the length of the contract, the  
5 wages, pension, health insurance, and

6 MR. WELD: The employer would stipulate that the fifth  
7 issue was seniority.

8 THE WITNESS: Seniority, that's correct.

9 MS. FRANCIS: The stipulation would be acceptable.

10 JUDGE VANDEVENTER: That is received.

11 Q BY MS. FRANCIS: Did you come to an agreement on those five  
12 topics at the April 10th meeting?

13 A No, no, we did not. We just set those -- we set those five  
14 topics as the topics that we would discuss at our next meeting.

15 Q And your next meeting was on May 1st?

16 A May 1st.

17 Q Okay, and did you -- why don't you just bring me through  
18 May 1st, that day. First of all, what time did the session  
19 start do you recall?

20 A May 1st I believe we started at 9:00 o'clock in the  
21 morning.

22 Q How long did it last?

23 A I think we were there until about 5:00.

24 Q And during that time were you meeting as a group with  
25 Respondent -- union and Respondent or --

26 A No, the - we were in one room and the company was in

1 another room and the mediator would work back and forth between  
2 the two rooms bringing the company's response to us and the  
3 union's response back to them.

4 Q And did you come to an agreement on the health insurance  
5 issue?

6 A Yes, we did.

7 Q And did you come to an agreement on wages?

8 A Yes, we did.

9 Q And was that - do you recall if the wages were increased?

10 A Yes, there was a wage increase. It was three percent the  
11 first year and two for the - two percent for each of the years  
12 after that.

13 Q Was there an agreement on the length of the contract?

14 A The contract length was agreed to at three years.

15 Q And regarding pension, was there agreements on that?

16 A No, we withdrew our proposal on the pension.

17 Q And what about seniority? Was there an agreement on  
18 seniority?

19 A Yes, there was.

20 Q And what was that agreement?

21 A That's a long agreement but part of that agreement - we  
22 didn't have very good seniority language in the contract and we  
23 agreed to language in the contract that would define how people  
24 - how seniority was defined. And in the process of that during  
25 - the process of doing that I had proposed a bumping provision  
26 in that. The company's proposal was that they didn't want the

1 bumping provision and at that point I said that we would -  
2 through the mediator - accept their proposal if they would take  
3 the language from one of the letters of understanding from the  
4 prior contract that would say how hours were scheduled -- group  
5 one employees the most hours; group two the employees the next  
6 more hours; and non-bargaining unit employees the least number  
7 of hours.

8 Q And was that accepted?

9 A Yes, it was.

10 Q And would you just turn briefly to General Counsel's  
11 Exhibit 2 and just point out which memorandum of understanding  
12 you are talking about when you said wanted it - taking that  
13 language?

14 A Let's see, it would be on page 24.

15 Q And that's the memorandum of understanding concerning  
16 employee's scheduled hours?

17 A Yes.

18 Q Were any of the other memorandums of understanding  
19 discussed in this back and forth exchange of proposals?

20 A No except the memorandum of understanding - when the  
21 employer accepted - I don't know if - I'm getting ahead of  
22 myself.

23 Q I think you might be.

24 A Okay.

25 Q So let me ask you another question first.

26 A Okay.

1 Q During this back and forth exchange of proposals when the  
2 mediator was coming to you with their responses and you were  
3 going -- the mediator was going to the Respondent with your  
4 responses, during that time was the 2001 letter of agreement  
5 talked about or brought up at all?

6 A No.

7 Q Okay. Now was there a time on May 1st when any of these  
8 attachments to the 1998 contract - the memorandums of  
9 understanding - when any of those were discussed?

10 A None of them were discussed. The only time we had any  
11 discussion was when the company accepted our final offer or we  
12 accepted their offer.

13 Q And what happened at that time?

14 A At that time I told the federal mediator - he was in our  
15 room telling us that the last offer that we had between us was  
16 acceptable to the company. And at that point in time I told him  
17 he had to go back to the company and tell them that we would  
18 accept - this offer would be acceptable to the union on the  
19 condition that the company not add any more interpretive notes  
20 to the labor agreement. Prior to my coming on to doing the  
21 negotiating the contract had gone back to the Board and the  
22 Board had added memorandum of understanding and interpretive  
23 notes that would - their determination of what language we had  
24 negotiated.

25 Q Okay, so I just want to make it clear, what you are  
26 referencing is there is some interpretive notes attached to the



1 1998 contract?

2 A Yes.

3 Q And would you just point that out?

4 A That would be on page 25 of the 1998 --

5 Q And so you indicated that you wanted - there was to be none  
6 of those added to the new contract?

7 A That's correct. No interpretive - I actually didn't say  
8 this one. I was referring to this one but my implication was  
9 that there would be no more interpretive notes. Nothing added  
10 to the contract after we made our final agreement. We had just  
11 reached a final agreement and nothing more was going to be added  
12 to it.

13 Q And did there come a time when you had a conversation with  
14 anyone from Respondent about that?

15 A Yes. The mediator said, "Well let's go out into the hall."  
16 He would - we were in one room and they were in another. Jose  
17 Rosario went and spoke to Kelly Clarke and she came out and we  
18 met in the hallway.

19 Q Okay, and what happened - was there anyone else in the  
20 hallway?

21 A Jose Rosario was there.

22 Q The mediator?

23 A Yes.

24 Q And what - can you just bring me through blow by blow what  
25 happened in that hallway?

26 A We went on into the hallway and I explained that I didn't

1 want anymore interpretive notes, but we also agreed at that  
2 point in time that anything that was on this memorandum of  
3 understanding - interpretive notes - that anything that was in  
4 conflict with the seniority language that we had just agreed on  
5 that they would supersede anything that was on this memorandum.  
6 And that was the extent of our conversation.

7 Q Okay, how long -

8 JUDGE VANDEVENTER: I didn't hear that last sentence.

9 Q BY MS. FRANCIS: Would you repeat that?

10 A That was the extent of our conversation.

11 JUDGE VANDEVENTER: Before that.

12 THE WITNESS: Our conversation was over when -

13 JUDGE VANDEVENTER: The sentence before that. I'm sorry,  
14 Mr. Hudyma.

15 MS. FRANCIS: Maybe why don't you just - if you don't mind  
16 repeating yourself.

17 JUDGE VANDEVENTER: He started out anything in conflict and  
18 then the voice went down. I didn't hear.

19 THE WITNESS: Anything that was in this memorandum of  
20 understanding - it's on page 25 - that was in conflict with the  
21 seniority language that we had just negotiated - that anything  
22 that was in conflict that the new language would supersede this  
23 language.

24 Q BY MS. FRANCIS: So, your understanding during this  
25 conversation was that the memorandum of understanding contains -

26 MR. WELD: I am going to object to counsel's leading the

1 witness at this stage.

2 JUDGE VANDEVENTER: Well, she is summarizing. She is  
3 permitted to it for summarizing. Continue.

4 MS. FRANCIS: I'm just going to repeat myself again. I'm  
5 sorry.

6 Q BY MS. FRANCIS: Your understanding is the memorandum of  
7 understanding that has the interpretive notes that's attached to  
8 the 1998 contract was agreed to during this hallway  
9 conversation?

10 A Yes.

11 Q But if there was something conflicting your current  
12 contract that you just talked about would take precedence?

13 A Yes.

14 Q How long did this conversation last in the hallway with Ms.  
15 Clarke?

16 A About a minute.

17 Q During this time did the 2001 letter of agreement - was  
18 that discussed?

19 A No.

20 Q Were any of the other memorandums of understanding  
21 discussed?

22 A No.

23 Q During this conversation did Ms. Clarke have anything with  
24 her?

25 A She had a - I believe it was a three ring binder and it was  
26 opened to this page.

1 Q Which page are you looking at?

2 A The memorandum of understanding interpretive notes. It  
3 would be page 25 I think - 25.

4 Q Is that the only page that her binder was open to during  
5 your conversation?

6 A That was the only page that it was open to and that was the  
7 only page that we discussed.

8 Q During this conversation did you see Ms. Clarke circle  
9 anything?

10 A No.

11 Q What happened at the end of the conversation?

12 A At the end of the conversation Ms. Clarke and myself and  
13 Mediator Rosario went back into the room that the union was in  
14 and we - she had a contract extension - as our contract had  
15 expired on March 31st and we were signing contract extensions.  
16 The previous extension had expired on that day. So we just  
17 signed another contract extension.

18 Q What was your understanding then of the status of the  
19 contract when you left on May 1st?

20 A I believed that we had a completed contract.

21 Q And what was your understanding with regards to a 2001  
22 letter of agreement in that contract?

23 A It was my thought at that point in time that we had not  
24 brought up that letter of understanding and therefore that  
25 letter of understanding died.

26 Q When did you first see a copy of the contract after the May

1 1st meeting?

2 A It was probably around May 12th or -

3 Q How did you receive it?

4 A May 12th or 9th. I received it by e-mail.

5 Q Mr. Hudyma, I have handed you two packets of documents.

6 One is that marked General Counsel Exhibit 7. One that is

7 marked General Counsel Exhibit 8.

8 (Witness proffered documents.)

9 Q If you first turn to General Counsel Exhibit 7, do you know  
10 what this document is?

11 A Yes, that's the final draft of our labor contract that we  
12 had negotiated and that Ms. Clarke had prepared and sent to us  
13 on May 9th.

14 Q There is some handwriting at the top. Can you explain  
15 that?

16 A Well, we received more than one final draft. This first  
17 draft we received I just wanted to make sure I knew when I  
18 received it.

19 Q So that's your handwriting?

20 A That's my handwriting.

21 MS. FRANCIS: I offer General Counsel Exhibit 7.

22 MR. WELD: No objection.

23 JUDGE VANDEVENTER: It's received.

24 (EXHIBIT RECEIVED: GENERAL COUNSEL'S NO. 7.)

25 Q BY MS. FRANCIS: When you received this contract, the copy  
26 of the contract, did you review it?

1 A Yes, I did.

2 Q And did you notice any issues with it?

3 A Yes, there are four - there were four incorrect entries in  
4 the contract.

5 Q Okay, and specifically is there any issue with Section  
6 1.1(b)?

7 A Section 1.1(b) was - is incorrect?

8 Q How so?

9 A It's the language that was in our pre-1998 contract and the  
10 dates are wrong. The Eau Claire County - or Chippewa County is  
11 excluded from that provision.

12 Q Now if you look on the first page of General Counsel  
13 Exhibit 7 between the lines of stars it indicates that there is  
14 a memorandum of understanding concerning employees' scheduled  
15 hours and a memorandum of understanding concerning non-  
16 bargaining unit employees in the Meat Department. Were these  
17 two memorandums attached to this contract when you received it?

18 A Yes.

19 Q And were either of these memorandums of understanding  
20 discussed during negotiations?

21 A The memorandum of understanding concerning scheduling of  
22 hours was. The memorandum concerning non-bargaining unit  
23 employees in the Meat Department was not.

24 Q First the one - the memorandum of understanding concerning  
25 employees' scheduled hours, how was that discussed?

26 A That was the memorandum we moved - we agreed to move into

1 the seniority clause.

2 Q But you said the second one - the second memorandum of  
3 understanding was not discussed?

4 A No, it wasn't.

5 Q Did you bring that up to Respondent?

6 A No, I did not.

7 Q Why not?

8 A This is basically a safety issue and I guess I viewed it as  
9 that. There's law that says that people under 18 cannot operate  
10 the equipment in the meat departments and so I ignored it.

11 Q So you ignored it?

12 A Yes. It was of no - it runs in our favor but it runs to  
13 the employee's favor and the employer's favor because, you know,  
14 injuries to these people would affect work comp rates and I just  
15 ignored it.

16 Q Now you said you did notice at least the one issue with the  
17 1.1(b) was the wrong language. Did you bring that up to  
18 Respondent at all?

19 A Yes, I did. In my e-mail of March 10th I told her that I  
20 found errors in the contract.

21 Q Are you looking now at General Counsel Exhibit 8?

22 A Yes.

23 Q And before then we talk about that would you just tell me  
24 what this packet of documents what it is?

25 A These are the e-mails that Kelly Clarke and I exchanged  
26 about the contract, errors in the contract, and so forth.

1 Q And there is some numbers - handwritten numbers - on that,  
2 could you - are those your - is that your handwriting?

3 A That's my handwriting. I did that to keep the sequence  
4 correct.

5 Q Chronologically?

6 A Right.

7 MS. FRANCIS: General Counsel offers General Counsel  
8 Exhibit 8.

9 MR. WELD: No objection.

10 JUDGE VANDEVENTER: General Counsel's 8 is received.  
11 (EXHIBIT RECEIVED: GENERAL COUNSEL'S NO. 8.)

12 Q BY MS. FRANCIS: So during the e-mail correspondence did  
13 you discuss 1.1(b)?

14 A Yes.

15 Q And I think the document speaks for itself but just to be  
16 accurate that's number 2 that's from you?

17 A That's correct.

18 Q The May 10th e-mail.

19 Were there any other issues with the contract - the draft  
20 of the contract?

21 A Yes, at that point in time I saw where we had in our health  
22 insurance issue that we had agreed on we had changed the  
23 timeframe where someone - a part-time employee becomes eligible  
24 for health insurance. And that - the language in the contract  
25 was incorrect. We had agreed to six weeks and that's in 11.1 of  
26 this final draft. It was wrongly worded to put six months.



1 Q And you pointed that out in your e-mail?

2 A Yes, I did.

3 Q And if you page through, it appears that your e-mails  
4 numbered 4, 5, 6, 7, 8 - I don't see a 9 - oh, 9, 10, and 11 are  
5 all concerning that health insurance issue?

6 A That's correct.

7 Q Through the course of these e-mails and any other  
8 conversations were you able to work out the agreement on that?

9 A Yes, our conversation was - I went back to the federal  
10 mediator and he looked through his notes and he - from his notes  
11 we determined that my assertion that it was a six week waiting  
12 period instead of six months was correct.

13 Q And did Respondent acknowledge that at some point?

14 A Yes. It isn't in our e-mails but we did have a telephone  
15 conversation where that was corrected.

16 Q All right, and if you turn to page 11 of the packet, number  
17 14, I see that there is two attachments to that.

18 A Yes, that's the - that would be the second final draft and  
19 the new wage scale that was sent to me by -

20 JUDGE VANDEVENTER: I'm sorry. What did you refer to?

21 MS. FRANCIS: Pardon me?

22 JUDGE VANDEVENTER: What was it that you asked him about?

23 MS. FRANCIS: The attachments that are on page 11.

24 JUDGE VANDEVENTER: Okay, reference on page 11?

25 MS. FRANCIS: Okay, thank you.

26 (Pause.)

1 Q BY MS. FRANCIS: I have handed you what has been marked as  
2 General Counsel Exhibit 9. Is that what was attached to your e-  
3 mail?

4 (Witness proffered document.)

5 A Yes.

6 Q And again there is some handwriting at the top. Is that  
7 your handwriting?

8 A That's my handwriting at the top.

9 MS. FRANCIS: I offer General Counsel Exhibit 9.

10 MR. WELD: No objection.

11 JUDGE VANDEVENTER: 9 is received.

12 (EXHIBIT RECEIVED: GENERAL COUNSEL'S NO. 9.)

13 Q BY MS. FRANCIS: Did you review General Counsel Exhibit 9  
14 when you received it?

15 A Yes, I did.

16 Q And were there any errors in it?

17 A Yes.

18 Q And what specifically did you note?

19 A The 1.1(b) part of the recognition clause is still  
20 incorrect. And I sent that back to - I sent that as an e-mail  
21 to Kelly on May 14th.

22 Q And again turning to General Counsel Exhibit 8, page 12,  
23 the e-mail that's numbered 15, is that the e-mail you are  
24 referring to?

25 A Yes.

26 Q And there again is a couple of attachments that are listed

1 on the front page, the memorandum of understanding concerning  
2 employees' scheduled hours and the same one, memorandum of  
3 understanding concerning non-bargaining unit employees. Were  
4 those attached to your contract when you received it?

5 A Yes, they were.

6 Q Were there any other attachments to the contract?

7 A No.

8 Q Was the letter of agreement from 2001 attached to this  
9 draft?

10 A No.

11 Q And I am not sure if I asked you but I will at this time.  
12 Was there a letter of agreement attached to General Counsel  
13 Exhibit 7, the one you received on May 9th?

14 A No.

15 Q Did you come to an agreement with Respondent regarding  
16 these errors that you e-mailed to Ms. Clarke?

17 A Yes, I did. Actually I typed out exactly how the 1.1(b)  
18 was supposed to read in that - this e-mail.

19 Q That would have been your May 14th e-mail?

20 A That's correct.

21 Q And did you hear from Ms. Clarke about this e-mail or about  
22 those errors after you sent the e-mail?

23 A Yes, because I had scheduled a ratification meeting and I  
24 needed those things to be corrected so that I could actually go  
25 back to the membership and she told me it was corrected - it  
26 would be corrected and I would get a copy. She assured me that

1 it was - when it was corrected. I did not get a copy of  
2 anything from that --

3 Q But it was your understanding that they agreed that those  
4 were errors?

5 A Yes.

6 Q Did you hold a ratification meeting?

7 A Yes, I did.

8 Q And what was the date of that meeting? Do you recall?

9 A The actual ratification meeting - I had to cancel the first  
10 one because we didn't have this language. The second meeting  
11 was on May 22nd and we had a ratification meeting that day.

12 Q What, if anything, did you pass out to the employees for  
13 the ratification meeting?

14 A I passed out to the employees the new wage scale, the new  
15 language for funeral leave, the new language for seniority, the  
16 changes in the health insurance, so I gave them changes -- the  
17 contract changes that we had negotiated at our last -- at our  
18 last negotiation session.

19 Q Was there any discussion or any reference by you to the  
20 employees at the ratification meeting about the 2001 letter of  
21 agreement?

22 A No.

23 Q What was the outcome of that ratification meeting?

24 A The contract was ratified.

25 Q And did you notify Respondent about that?

26 A Yes, I did.

1 Q How did you do that?

2 A I can't remember whether I did it by e-mail or by letter.

3 Q After the ratification vote, did you receive any other  
4 copies of the contract from Respondent?

5 A After that contract was ratified, we received a draft for a  
6 -- for the contract that would that which -- had gone to the  
7 Consumer Cooperative's board of directors for signatures.

8 Q How did you receive that copy?

9 A That was by mail.

10 (Pause.)

11 Q Mr. Hudyma, I am giving you two packets of documents. The  
12 first is marked General Counsel Exhibit 10. The second is  
13 marked General Counsel Exhibit 11. Referring first to General  
14 Counsel Exhibit 10 could you identify this please?

15 (The witness was proffered the document.)

16 A Yes, this is the contract with the signatures -- the  
17 company signatures on it.

18 Q Is that what you received in the mail?

19 A This is the one I received in the mail.

20 MS. FRANCIS: I offer General Counsel Exhibit 10.

21 MR. WELD: No objection.

22 JUDGE VANDEVENTER: Received about when, do we know? How  
23 many days after the ratification vote or some way to date it.

24 THE WITNESS: I -- I received this on -- it might have come  
25 to my office before that, but I opened this on June 2nd.

26 Q BY MS. FRANCIS: And did you review the document when you

1 received it?

2 A Yes, I did.

3 Q What, if anything, did you notice about it.

4 A Well, on the first cover page there is now listed a letter  
5 of agreement. That is the first time that appeared.

6 Q And was that attached to the document?

7 A Yes, and that letter is attached to the last page of the  
8 contract.

9 Q Had you seen this document prior to receiving it in the  
10 mail? The letter of agreement.

11 A No.

12 Q Did you contact Respondent about the appearance of the  
13 letter of agreement?

14 A Yes, I did. On June 2nd I believe my first e-mail is at  
15 2:37 in the afternoon.

16 Q Okay, I'm just going to stop you. So you are now referring  
17 to General Counsel Exhibit 11?

18 A Yes.

19 Q Again these are a packet of e-mails between you and Ms.  
20 Clarke?

21 A That's correct.

22 MS. FRANCIS: And I'll offer General Counsel Exhibit 11.

23 MR. WELD: No objection.

24 JUDGE VANDEVENTER: 11 is received.

25 (EXHIBIT RECEIVED: GENERAL COUNSEL'S NO. 11.)

26 JUDGE VANDEVENTER: I'm sorry, did you offer 10?

WALLS & WALLS  
12124 Hampshire Avenue North  
Champlin, Minnesota 55316  
(763) 422-8938

1 MS. FRANCIS: Pardon me?

2 JUDGE VANDEVENTER: Did you offer 10?

3 MS. FRANCIS: I will at this time if I have not already.

4 MR. WELD: No objection.

5 JUDGE VANDEVENTER: 10 is received.

6 (EXHIBIT RECEIVED: GENERAL COUNSEL'S NO. 10.)

7 Q BY MS. FRANCIS: So you were explaining June 2nd was the  
8 first e-mail about the letter of agreement, is that right?

9 A That's correct. I sent her a letter saying that this  
10 letter of agreement had been added to the contract. It was not  
11 brought up in negotiations or any subsequent e-mails or  
12 conversations that we had and therefore not part of the  
13 agreement reached. I told her we would be willing to sign a  
14 contract that we agreed to.

15 Q Were there any conversations over the phone between you and  
16 Ms. Clarke about the letter of agreement?

17 A About this time --

18 Q "About this time", what are you referring to?

19 A June 2nd - June 3rd that I talked to Ms. Clarke about this.  
20 She told me at that time that the - she did not have the letter  
21 of agreement as part of the contract that she was working from  
22 and that it was in a separate computer file and that she  
23 actually didn't know about it until they found it in their  
24 computer file.

25 Q Did you have any further communications with Ms. Clarke  
26 regarding the contract?

1 A Yes, we again went back to the federal mediator to try to  
2 resolve this issue because I was certain that he was there at  
3 the time that we made this - that we looked through the contract  
4 in the - at our sidebar and -

5 Q And was that - did that help resolve the issue?

6 A No, it did not. He told me that he was not - he didn't  
7 hear our conversations. He didn't - he said he walked away so  
8 he didn't - he could not say one way or another what we had  
9 discussed.

10 Q Did Ms. Clarke dispute that at all?

11 A Yeah, she did. She told me that we had went through all  
12 those agreements in our sidebar.

13 Q Did Ms. Clarke ever indicate if she had spoken to the  
14 mediator about it?

15 A I believe she did. I am just trying to check my e-mails  
16 but I believe that she did talk to the federal mediator and he  
17 couldn't validate her position either.

18 Q I handed you two more documents marked General Counsel  
19 Exhibits 12 and 13. Could you tell me what General Counsel  
20 Exhibit 12 is?

21 (Witness proffered documents.)

22 A General Counsel 12 is a letter to me from Kelly Clarke  
23 discussing this issue -

24 Q And I see --

25 A -- the issue of the letter of understanding.

26 Q I see that it's dated July 1, 2003. Did you receive it on



1 or about that day?

2 A Yes.

3 MS. FRANCIS: I offer General Counsel Exhibit 12.

4 MR. WELD: No objection.

5 JUDGE VANDEVENTER: 12 is received.

6 (EXHIBIT RECEIVED: GENERAL COUNSEL'S NO. 12.)

7 Q BY MS. FRANCIS: Can you explain what General Counsel  
8 Exhibit 13 is?

9 A General Counsel Exhibit 13 is my response to Ms. Clarke's  
10 letter to me.

11 Q And it's dated July 8th. Did you send it on or about that  
12 date?

13 A Yes.

14 MS. FRANCIS: I offer General Counsel 13.

15 JUDGE VANDEVENTER: Any objection?

16 MR. WELD: No objection, Judge.

17 JUDGE VANDEVENTER: 13 is received.

18 (EXHIBIT RECEIVED: GENERAL COUNSEL'S NO. 13.)

19 (Pause.)

20 Q BY MS. FRANCIS: I want to turn now to the letter of  
21 agreement that is in issue. I have handed you three documents,  
22 General Counsel Exhibits 14, 15, and 16. First, why don't you  
23 just first explain to me how did the 2001 letter of agreement  
24 come into play? How did it - why was it created?

25 (Witness proffered documents.)

26 A From the very beginning when I started in 1999 I had

1 meetings with - a few meetings with our - the prior HR Director  
2 and Rick Lambract and I believe Rick was there at the meetings  
3 too discussing the wage situation at the stores and the marts.  
4 Through the process of that the company - we talked back and  
5 forth a number of times about the wages were low and they needed  
6 to be changed. The company made this offer to the employees and  
7 it was a substantial wage increase for the employees.

8 Q It looks like you're holding a document. Is that General  
9 Counsel 14?

10 A Yes.

11 Q Dated November 14, 2000?

12 A Yes.

13 Q What is that again?

14 A That's - the wages were - payment of the wages was  
15 conditioned on signing this letter.

16 MS. FRANCIS: I offer General Counsel 14.

17 MR. WELD: No objection.

18 JUDGE VANDEVENTER: 14 is received.

19 (EXHIBIT RECEIVED: GENERAL COUNSEL'S NO. 14.)

20 Q BY MS. FRANCIS: Would you explain what General Counsel 15  
21 is?

22 A Mine don't have numbers on them.

23 Q Oh, I'm sorry. It is the one titled "Letter of Agreement".

24 A Okay.

25 Q Is that your signature at the bottom?

26 A Yes, it is.

1 MS. FRANCIS: At this point would Respondent stipulate that  
2 this is actually the copy I received from Respondent?

3 MR. WELD: That is correct.

4 Q BY MS. FRANCIS: I just wanted to point out that there  
5 appears to be a marking on the page around number 5, do you see  
6 that?

7 A Yes.

8 Q And have you seen that - did you see that document with  
9 that marking previously?

10 A No.

11 Q And if you - does the letter of agreement reference Section  
12 1.1(b)?

13 A Yes, it does.

14 Q And I believe clarifies it is how it's termed, is that  
15 right?

16 A That's correct.

17 Q And you signed that document in 2001 with that language in  
18 it?

19 A Yes.

20 Q And why did you do that?

21 MR. WELD: I'm going to object. The answer is irrelevant  
22 in why he signed a document in 2001.

23 JUDGE VANDEVENTER: It was part of your opening statement  
24 as I recall. I'm going to hear it.

25 THE WITNESS: This document was signed - it was a condition  
26 to receive the wages listed on the wage page that's attached to

1 this document.

2 Q BY MS. FRANCIS: And if you can just take a moment and keep  
3 the letter of agreement in front of you and also take the  
4 General Counsel Exhibit 10, the final signed agreement, and if  
5 you would flip to the last page. In your review of the two  
6 documents - the letter of agreement that you signed in 2001 and  
7 the letter of agreement attached in 2003 - are they the same  
8 document?

9 A No, the dates are changed on the document. They reference  
10 the same - they reference different contract period dates. This  
11 to me, if this letter was supposed to be part of the contract,  
12 it appears to me that because of all the changes in it that  
13 quite honestly this would have had to have been thrown on the  
14 table as part of negotiations and it was not.

15 Q And just to be clear, the letter of agreement that has a  
16 signature of Margaret Melrose, is this a document that you had  
17 seen anytime prior to receiving it in the mail?

18 A No.

19 Q And the letter of agreement that you signed can you just  
20 tell me what number references Section 1.1(b)?

21 A No. 5.

22 Q And on the letter of agreement that you received in the  
23 mail attached to the final contract what number references  
24 1.1(b)?

25 A No. 4.

26 Q Prior to entering into the letter of agreement in 2001

1 which by its terms clarifies Section 1.1(b) are you aware of any  
2 changes made to Section 1.1(b)?

3 A We made changes in the 1998 contract into 1.1(b) and that  
4 was to include Chippewa County within our jurisdiction.

5 Q If you would turn to General Counsel 16 - it should be in  
6 front of you also. Would you explain what that document is?

7 A This is the declaration page for the contract period from  
8 1992 to 1998.

9 Q And the second page?

10 A The second page is the recognition clause and union shop  
11 clause.

12 Q So Section 1.1(b) of this document of this document is  
13 different than Section 1.1(b) in General Counsel Exhibit 2,  
14 which is the 1998 contract?

15 A Yes.

16 MS. FRANCIS: I offer General Counsel Exhibits 15 and 16.

17 MR. WELD: The employer has no objection to General  
18 Counsel's 14, 15, and 16.

19 JUDGE VANDEVENTER: Did you mean to offer 14 as well?

20 MS. FRANCIS: Yes. I thought I'd offered it but I will  
21 offer that as well.

22 JUDGE VANDEVENTER: I don't have it checked off.

23 MS. FRANCIS: Okay.

24 JUDGE VANDEVENTER: There is no objection to 14, 15, or 16  
25 and they are received.

26 (EXHIBITS RECEIVED: GENERAL COUNSEL'S 14, 15, AND 16.)

1 Q BY MS. FRANCIS: When you were explaining how the letter of  
2 agreement from 2001 came into existence you mentioned that it  
3 was - there was a wage offer - it was tied to wages, is that  
4 right?

5 A That's correct.

6 Q Were wages negotiated in the current contract - the  
7 negotiation sessions in March, April and May?

8 A Yes.

9 Q Were wages increased?

10 A Yes.

11 Q Why are you unwilling to sign the new letter of agreements?

12 A The new letter of agreement would change the recognition  
13 clause and it's something that we did not negotiate.

14 Q Up until the time you received that letter of agreement in  
15 - attached to the June - the contract you received in June what  
16 was your understanding of the 2001 letter of agreement as it  
17 relates to the new contract?

18 A My understanding even from this negotiation and other  
19 negotiations that we do is that we put that - all letters of  
20 understanding on the table and this letter of understanding was  
21 never placed on the table and therefore I believe that by the  
22 provisions in our contract that it actually dies with the  
23 contract. In fact the letter actually has the expiration dates  
24 of the contract on it; therefore, I believe if it's not part of  
25 the negotiations, then that letter of agreement dies.

26 MS. FRANCIS: I have no further questions.

1 JUDGE VANDEVENTER: Okay, thanks.

2 MR. WELD: Yes, Judge.

3 CROSS EXAMINATION

4 Q BY MR. WELD: Mr. Hudyma, let's pick up on the response to  
5 that last question.

6 JUDGE VANDEVENTER: Are you going to ask for an affidavit  
7 first?

8 MR. WELD: Yes, I was, Judge. I'm sorry.

9 JUDGE VANDEVENTER: So why don't we do that and then we'll  
10 take a break and give you an opportunity to look over that  
11 affidavit.

12 MR. WELD: That would be great. I would make a request  
13 under 102.118 for -

14 JUDGE VANDEVENTER: About how many pages do we got?

15 MS. FRANCIS: I have two documents. One is an affidavit  
16 that is five pages in length. And the other is a document  
17 presented to the Region and signed by Mr. Hudyma that is  
18 approximately 11 pages in length. I'll also note for Respondent  
19 that the second document has an index of exhibits that were  
20 attached to it. I believe they have all been introduced but I  
21 did not make copies of them. I do have the originals if there  
22 is one that you want to see.

23 JUDGE VANDEVENTER: About how long do you think Mr. Weld?

24 MR. WELD: 10 minutes, Judge.

25 JUDGE VANDEVENTER: Okay, let's take 20 minutes because  
26 we'll want a little break and Mr. Weld even gets a break also.

1 So we'll be back on the record in 20 minutes.

2 Off the record.

3 (Brief recess taken.)

4 JUDGE VANDEVENTER: We are on the record.

5 We begin with Mr. Weld's cross examination.

6 MR. WELD: Okay, thank you, Judge.

7 Q BY MR. WELD: Dan, do you have General Counsel No. 2, the  
8 pre-existing contract in front of you?

9 A Yes.

10 Q And do you also have General Counsel No. 10, which was the  
11 draft of the collective bargaining agreement that was sent to  
12 you in June of this year?

13 A Yes.

14 Q Now following up on your response to Attorney Francis'  
15 questions regarding the memorandums of agreement you indicated  
16 that the memorandums of agreement, as I understood your  
17 testimony, would evaporate at the end of the contract term  
18 unless the parties specifically agreed to include them, is that  
19 correct?

20 A Yes.

21 Q Comparing General Counsel 2 with General Counsel No. 10  
22 there appear to be three memorandums of understanding attached  
23 to General Counsel No. 2, is that fair?

24 A That's correct.

25 Q They would be at pages 24, 25, and 26 of General Counsel  
26 No. 2?



1 A That's correct.

2 Q Now as I understood your direct testimony to the memorandum  
3 of understanding concerning employee scheduled hours was  
4 incorporated in the collective bargaining agreement, was it not?

5 A That's correct.

6 Q So that would be not included then in General Counsel No.  
7 10?

8 A No.

9 Q As a memorandum of understanding?

10 A As a memorandum of understanding.

11 Q Okay, then on your direct testimony you also made reference  
12 to the memorandum of understanding located on page 26 - the meat  
13 department reference. And as I understood your testimony, you  
14 simply ignored the fact that the company included that in the  
15 draft of the 2003-2006 contract?

16 A More correct, if you want to put it that way, the attention  
17 - my attention was drawn to the letter of understanding. That  
18 proved to distract my attention from reading that other  
19 understanding until later when I did talk to our legal counsel.  
20 At that point in time he asked me about that and, you know, my  
21 response at that time was it doesn't benefit either - there's no  
22 benefit to - through the Union Local - to the Local employees  
23 and there's no direct benefit to the employer or detriment to  
24 the employer; therefore, it's an issue of safety. So I chose to  
25 ignore it.

26 Q So you chose to ignore it?

1 A Yes.

2 Q And indeed agreed that the memorandum of understanding  
3 regarding the meat department should be continued as part of the  
4 2003-2006 contract?

5 A It's of no consequence to me whether it does or not.

6 Q So is your response then -- despite your legal  
7 understanding that it evaporated -- you agree that it should be  
8 included in the 2003-2006 contract?

9 A There again it does not - I don't care one way or another  
10 whether it comes out of the contract because it was not  
11 negotiated or whether it stays in the contract. It has no  
12 consequence at all.

13 Q So you are prepared to sign a contract for 2003-2006 with  
14 that memorandum of understanding attached?

15 A If it's attached, it's fine. If it's not attached, that's  
16 fine too.

17 Q Now there is a third memorandum of understanding which is  
18 located on page 25 of General Counsel No. 2 and that appears to  
19 be an interpretive note addressing four different provisions of  
20 the collective bargaining agreement.

21 A That's correct.

22 Q Now that document was also attached to the contract's  
23 drafts for the 2003-2006 contract, was it not?

24 A Yes, it was.

25 Q And you again chose not to exercise what you asserted was  
26 your legal right to have that memorandum of understanding

1   evaporate, is that not correct?

2   A     No, that's not correct. That specific item there we talked  
3   about that in our sidebar. In fact, that's the only thing we  
4   talked about in our sidebar was that the effect of that language  
5   on the just newly negotiated seniority language - and our  
6   conversation in the hall was something to these words that  
7   anything that is in this memorandum of understanding which is in  
8   contradiction to the new language that we had on seniority - the  
9   new language on seniority would overrule this memorandum of  
10  understanding. Therefore, because we discussed it and because  
11  we agreed that they could stay as it was then that letter of  
12  understanding would stay within the contract.

13  Q     How about was there any discussion dealing with the  
14  memorandum of understanding located on page 24 of General  
15  Counsel No. 2 dealing with the employee's scheduled hours?

16  A     Yes.

17  Q     When did that conversation occur?

18  A     That conversation took - actually it started on our - on my  
19  very first proposal to the company. That is I took that  
20  language and put it into the body of the contract and I  
21  explained that at the time.

22  Q     Was there any discussion regarding the memorandum of  
23  understanding specifically being excluded from the new draft of  
24  the contract?

25  A     The language that we used to - on - when we changed our  
26  seniority proposal on the very last day on May 1st the language

1 was that we would take that language from that letter and put it  
2 into the new seniority language that we had just agreed on.  
3 That was my answer - my proposal or response to the company's  
4 wanting to remove the bumping language that I put into the  
5 contract.

6 Q Let's take a look at the next page of General Counsel No.  
7 2, which is the wage grid for the years '98 and beyond. You  
8 indicated that the parties agreed to a three percent wage  
9 adjustment effective in 2003?

10 A That is correct.

11 Q And then subsequently percentage adjustments for the  
12 separate years?

13 A Two percent per year.

14 Q Did the parties use page 27 of General Counsel No. 2 as the  
15 base point from which they made the adjustment of three percent  
16 and two percent and two percent?

17 A No, they did not.

18 Q We used, in fact, the letter of agreement -- the wage  
19 schedule that was attached to the letter of agreement, General  
20 Counsel No. 15, is that not correct?

21 A We used the wage schedule, yes.

22 Q That the parties negotiated in 2000/2001?

23 A That is correct.

24 Q And part of the 2000/2001 negotiations included paragraph  
25 number 5 of General Counsel 15 which is the clarification of  
26 1.1(b), isn't that correct?

1 A That is correct.

2 Q Subsequent to the execution of that letter of agreement did  
3 the employer purchase a store in Chippewa County?

4 A Yes, they did.

5 Q And, in fact, did you attempt to organize that store?

6 A Yes, I did.

7 Q And did the company rely on the letter of agreement in that  
8 window between 2001 and today in resisting, if you will, your  
9 attempts to seek automatic representation of the employees in  
10 that store?

11 A Yes, they did.

12 Q So you were aware of that provision and the significance of  
13 that letter of agreement when you approached the bargaining  
14 table this time around, were you not?

15 A Completely.

16 Q And, in fact, if you look at General Counsel No. 3, those  
17 are your initial proposals are they not for this round of  
18 bargaining?

19 A Yes, they are.

20 Q And the turning to page 3 of that document specifically  
21 Section 2.4 would it be fair to say that that was an attempt to  
22 adjust 1.1(b) as interpreted by that letter of agreement?

23 A Yes, it was.

24 Q And, in fact, you made that proposal in a March bargaining  
25 session?

26 A Yes, I did.

1 Q In making that proposal didn't you say to the employer you  
2 have made two mistakes in your life and one of them was agreeing  
3 to that letter of agreement?

4 A That is absolutely correct.

5 Q So you were aware that that letter of agreement was again  
6 significant?

7 A Yes, it was.

8 Q Now did Section 2.4 become part of the collective  
9 bargaining agreement?

10 A No.

11 MR. WELD: No other questions, Judge.

12 JUDGE VANDEVENTER: Any redirect?

13 REDIRECT EXAMINATION

14 Q BY MS. FRANCIS: If you just want to turn back to General  
15 Counsel's 2, the last page is memorandums of understanding.  
16 Respondent's attorney questioned you kind of extensively  
17 regarding whether these should evaporate as you thought would  
18 happen with the letter of agreement from 2001. Looking first to  
19 the memorandum of understanding concerning employee's scheduled  
20 hours on the face of that document is there anything that  
21 references dates?

22 A No.

23 Q How about on memorandum of understanding - the interpretive  
24 notes - this next one? Anything that references dates?

25 A No.

26 Q Finally the memorandum of understanding concerning

1 employees in the meat department is there anything that  
2 references dates?

3 A No.

4 Q When you made your proposal, your initial proposal, that  
5 Respondent's attorney was just referencing from General Counsel  
6 3 Section 2.4, did Respondent respond in any way that we reject  
7 it - we are relying on the letter of agreement?

8 A No. They rejected it but no other conversation was - no  
9 one mentioned any letter of agreement.

10 Q And you discussed that the memorandum of understanding on  
11 page 26 concerning the meat department employees - you testified  
12 that that was not discussed during bargaining but it was  
13 attached to the copies of the contract?

14 A Yes.

15 Q Are you willing to sign the contract without that  
16 memorandum of understanding attached since it was not discussed?

17 A Yes.

18 Q But you are also willing to sign it even if they want to  
19 include it?

20 A That's correct.

21 MS. FRANCIS: I have no further questions.

22 JUDGE VANDEVENTER: Any recross, Mr. Weld?

23 MR. WELD: None of this witness, Judge.

24 JUDGE VANDEVENTER: Thank you, Mr. Hudyma, for your  
25 testimony. You may step down.

26 (Witness excused from the stand.)

1 MR. WELD: Brick Hopkins please.

2 JUDGE VANDEVENTER: General Counsel hasn't rested yet.

3 MR. WELD: Oh, I'm sorry.

4 JUDGE VANDEVENTER: Are you going to rest, Ms. Francis?

5 MS. FRANCIS: I'm sorry. I do rest.

6 JUDGE VANDEVENTER: You may proceed, Mr. Weld.

7 (WITNESS SWORN: BRICK HOPKINS)

8 JUDGE VANDEVENTER: Counsel - Ms. Francis, could you remove  
9 those exhibits because this witness may or may not be using  
10 those. He can be directed - his attention can be directed to  
11 them as needed.

12 Mr. Weld?

13 DIRECT EXAMINATION

14 Q BY MR. WELD: Brick, can you spell your last name for the  
15 record please?

16 A Name is Brick Hopkins, H-O-P-K-I-N-S.

17 JUDGE VANDEVENTER: And your first name is Greg?

18 THE WITNESS: Brick, B-R-I-C-K.

19 JUDGE VANDEVENTER: Okay. No wonder I didn't get it. And  
20 if you could - this might help - if the parties don't mind, if  
21 you could turn your chair just slightly so you are actually  
22 facing that way that may help us all to hear. Bear in mind that  
23 this room is difficult to hear in and it will help us all if you  
24 will keep your voice up maybe even a little louder than you  
25 usually talk. Thank you.

26 Q BY MR. WELD: Brick, who is your employer?

WALLS & WALLS  
12124 Hampshire Avenue North  
Champlin, Minnesota 55316  
(763) 422-8938



1 A Mega Management, Inc.

2 Q And could you explain what Mega Management does?

3 A Mega Management is the managing arm of the Consumers  
4 Cooperative. It owns the real estate of the convenience stores  
5 and manages all the facilities of the Consumers Cooperative and  
6 the employees.

7 Q In what position are you employed?

8 A I am Vice President of Operations.

9 Q As Vice President of Operations do you have a role in the  
10 collective bargaining process?

11 A Yes, I do. I was part of the negotiating committee.

12 Q That would be for the 2003 collective bargaining agreement?

13 A And the prior contract.

14 Q The '98 contract?

15 A '98, correct.

16 Q Were you also involved in the discussions which lead to the  
17 letter of agreement in 2001?

18 A Yes, I was.

19 Q I'll have you turn to General Counsel No. 15. Do you have  
20 General Counsel 15 in front of you?

21 (Witness proffered document.)

22 A Yes, I do.

23 Q Could you explain the genesis of that letter of agreement?

24 A The company's position when this agreement was written was  
25 that the employees should have a right to choose whether their  
26 facility is a union facility or a non-union facility and the

1 language of 5 was added for clarification purposes.

2 MS. FRANCIS: Your Honor, could I interject for a moment?  
3 Could we go off the record for just one moment?

4 JUDGE VANDEVENTER: Yes. Off the record.

5 (Brief recess taken.)

6 JUDGE VANDEVENTER: On the record.

7 To the extent possible, Mr. Weld, just ask the witness  
8 questions. He doesn't have to repeat anything that's already in  
9 evidence. If it's on the document, we know it.

10 MR. WELD: Just for background purposes, Judge, seeing you  
11 are talking about a potentially bench decision here.

12 Q BY MR. WELD: The clarification would be a clarification of  
13 Section 1.1(b) of the pre-existing collective bargaining  
14 agreement?

15 A That's correct.

16 Q What was the employer's concern about 1.1(b)?

17 A Prior to the clarification statement any new facilities we  
18 would automatically - the employees became automatically part of  
19 the bargaining agreement and this was clarifying that statement  
20 and not - they would not be part of the agreement unless they  
21 chose to do so.

22 Q And was a substantial wage adjustment part of the trade in  
23 2001?

24 A Yes, it was.

25 Q Now subsequent to the enactment of that letter agreement or  
26 the agreement to that letter of agreement did Mega Management or

1 Consumer Cooperative purchase a store a Chippewa Falls?

2 A Yes, we did.

3 Q And did the union attempt to organize that store?

4 A Yes.

5 Q And what happened?

6 A We told the union that it was not automatically recognized

7 - that it would require the union or the employees vote to

8 determine if that's what - if it's what was going to be

9 recognized.

10 Q And, in fact, did the employees organize?

11 A No. There was an agreement reached that the union could  
12 come up into the store and meet with the employees in a room and  
13 we would meet with the employees after that and it never took  
14 place.

15 Q Now did the union attempt to address that issue in the  
16 negotiations for the 2003 contract?

17 A Address the issue of adding existing facilities?

18 Q Yes.

19 A They did.

20 Q That would be Section 2.4?

21 A Yes.

22 Q Did Mr. Hudyma explain the purpose of his proposed 2.4?

23 A Yes, he stated as it was previously stated that he's made  
24 two mistakes and adding that letter of agreement was one of them  
25 and the purpose was to change the language.

26 Q Did the company agree to change the language?

1 A Absolutely not.

2 Q That was a high priority from the company's perspective?

3 A Absolutely.

4 Q Now, Mr. Hudyma has testified that Federal Mediator Rosario  
5 assisted the parties in the negotiations at their April and May  
6 bargaining sessions, is that correct?

7 A Yes, it is.

8 Q And at the May session did - I'm sorry - at the April  
9 session did Mr. Rosario ask the parties to focus on five issues  
10 in the subsequent or May 1st session?

11 A Yes, he did.

12 Q And, in fact, did the parties do that?

13 A Yes.

14 Q Was an agreement reached or a tentative agreement reached  
15 at the May 1st bargaining session?

16 A The May 1st one? I guess, bring me up to speed. Is that  
17 the one at the Heartland Inn?

18 Q That would be the fourth session.

19 A Correct.

20 Q The second session with Mr. Rosario.

21 A Yes, it was.

22 Q Okay. Now, could you explain to the judge how the company  
23 became aware that its offer on the five issues was acceptable to  
24 the union? What happened?

25 A Repeat the question.

26 Q How did the company become aware that the union was

1 accepting the company's offer on the five remaining issues?

2 A The federal mediator came into our hotel room and stated  
3 that all of the items had been agreed upon but that Dan had  
4 issues with the stuff at the end - the items at the end. And we  
5 asked for a clarification of what did he mean by issues. And  
6 Jose said he either doesn't want them or he doesn't want any new  
7 ones. And we stated we need to know what the difference is. If  
8 he doesn't want new ones, that's fine but the existing ones have  
9 to stay and we specifically talked about the letter of agreement  
10 that was added in the 2001 negotiations and it was extremely  
11 important to the company.

12 Q The letter of agreement we are referencing now is General  
13 Counsel's No. 15?

14 A That's correct.

15 Q Now you say it was a part of the agreement. It was  
16 negotiated mid-contract term, was it not?

17 A Yes.

18 Q But it was physically made a part of the contract by the  
19 company?

20 A Yes, it was.

21 Q And indeed we used that wage schedule?

22 A Yes, we did.

23 Q And you also used paragraph 5, the clarification?

24 A Yes, we did.

25 Q Now when you explained the company's concern about  
26 continuation of the memorandums of understanding and the letter

1 of agreement, what did Mr. Rosario do?

2 A He wasn't sure whether Dan had issues with new or existing  
3 and he recommended that there be a sidebar between Kelly and Dan  
4 in the hallway and Jose.

5 Q And, in fact, did that sidebar occur?

6 A Yes, it did.

7 Q How long were the parties out of the caucus room?

8 A Three minutes.

9 Q When Ms. Clarke returned, what did she say about the  
10 union's position regarding the addendums to the contract?

11 A Both returned - the mediator and Kelly - and we were told  
12 that it was only new additions. It was not old additions. It  
13 was not eliminating anything that was in the contract - in the  
14 addendums and we celebrated.

15 Q And when we talk about the additions, we're talking about  
16 the three memorandums of understanding which were located in  
17 General Counsel No. 2 as well as the letter of understanding -  
18 or said letter of agreement?

19 A Yes.

20 Q And specifically that was discussed? The letter of  
21 agreement?

22 A Many times prior to her going out and coming back in.

23 Q And Mr. Rosario was with you in both situations?

24 A Yes.

25 Q At the May 1st meeting did you have an understanding as to  
26 whether or not the letter of agreement, which is General Counsel

1 15, would be attached to the new collective bargaining  
2 agreement?

3 A We felt we did. Yes. There was no question in our mind.

4 Q And Ms. Clarke was under that impression when she went into  
5 the sidebar meeting and also when she returned from the sidebar  
6 meeting?

7 A That it would be included?

8 Q Yes.

9 A That was the question of the sidebar meeting is that was  
10 Dan looking for new or was he okay with the existing and he  
11 wanted to change those. When she came back, she stated that he  
12 didn't have a problem with the existing. He didn't want any new  
13 addendums.

14 Q And specifically was the letter of agreement, which is  
15 General Counsel No. 15, considered new or existing?

16 A Existing.

17 Q And Ms. Clarke reported it that way?

18 A Yes.

19 MR. WELD: No other questions of this witness, Judge.

20 JUDGE VANDEVENTER: Cross examination, Ms. Francis?

21 MS. FRANCIS: Yes.

22 CROSS EXAMINATION

23 Q BY MS. FRANCIS: You testified that even though the letter  
24 of agreement was made mid-contract it was you said physically  
25 made part of the contract?

26 A That's correct.

1 Q How?

2 A We have a union contract that we issue to new employees.  
3 We show them. I say we show them. I should step back on that.  
4 As management we have a copy of the contract that is in a  
5 binder. It's not like that. It's a binder with three hole  
6 punches that we operate off of. So any changes of our contract  
7 it's changed in every manager's contract file.

8 Q You said that the letter of agreement from 2001 is  
9 something that was extensively talked about many times before  
10 Ms. Clarke went out to that sidebar.

11 A Many times in the discussion with Jose about the in -- "in  
12 agreements."

13 Q Was it ever discussed with the union?

14 A The only time it was discussed with the union was when Dan  
15 made mention that that was the one mistake - two mistakes that  
16 he's ever made in his life.

17 Q But you had many discussions with Ms. Clarke about it  
18 before she went into -

19 A Many relative to the timeframe of her going out to discuss  
20 it with Dan.

21 Q This was something you were obviously concerned about?

22 A Very.

23 Q And so when she came back and she said no new addendums -  
24 is what I think you said - nothing new, did you specifically  
25 talk about the letter of agreement?

26 A I stated are we talking about the letter agreement and yes



1 - she said yes.

2 Q She said yes?

3 A Yes. She said that Dan had an issue with one of the  
4 memorandums but he didn't really know what it was. He had a  
5 migraine and he wasn't sure what it was. But it wasn't an  
6 issue.

7 Q And she told you this when she came back from the sidebar?

8 A With Jose.

9 Q Mr. Hopkins, do you recall giving an affidavit in  
10 connection with this investigation?

11 A Yes.

12 Q And do you recall discussing the topic of Ms. Clarke going  
13 to the sidebar meeting and coming back from the sidebar meeting?

14 A I believe so, yes.

15 MS. FRANCIS: May I approach the witness?

16 JUDGE VANDEVENTER: You may.

17 Q BY MS. FRANCIS: Mr. Hopkins, is this the affidavit that  
18 you gave?

19 A Yes, it is.

20 Q And it's two pages in length and on page 2 is that your  
21 signature?

22 A Yes, it is.

23 Q I am going to step by you here. If you will read along  
24 with me, on page 1 I am going to read from line 14. It says, "3  
25 to 5 minutes later Clarke came back with Rosario and said he's  
26 fine with the existing agreements. It's only with anything new

1 that he had a problem and that we weren't going to add anything  
2 new."

3 A That's correct.

4 Q "There was nothing else said." Do you see that as well?

5 A Yes, I do.

6 Q And you told the truth when you gave that affidavit?

7 A Yes, I did. That was a -

8 Q I think you answered my question. Thank you.

9 A Okay.

10 Q When Ms. Clarke came back - strike that.

11 MS. FRANCIS: I have no further questions.

12 JUDGE VANDEVENTER: Any redirect?

13 MR. WELD: Yes.

14 REDIRECT EXAMINATION

15 Q BY MR. WELD: Brick, counsel has shown you your affidavit  
16 from the investigation in this matter and there is a reference  
17 to a sentence, "There was nothing else said." What were you  
18 referring to when you made that comment?

19 A Any other issues that were addressed out in the hall.

20 Q Did Ms. Clarke come back and talk about what Mr. Hudyma had  
21 concerns were regarding the memorandums of understanding and  
22 letter of agreement?

23 A Yes, but he was unable to recite what those were.

24 Q Meaning Mr. Hudyma?

25 A Not the letter of understanding. The memorandum. He was  
26 unable to recite what problem he had.

1 Q Did Ms. Clarke identify that Mr. Hudyma had no problems  
2 with the letter of agreement?

3 A That's correct.

4 Q And that the letter of agreement would be attached to the  
5 new contract?

6 A That's correct.

7 Q What did she say?

8 A She actually showed us where she had circled it and  
9 addressed it.

10 Q She had circled paragraph 5 of that letter of agreement?

11 A That's correct.

12 Q And by "us" was Mr. Rosario one of the people that she  
13 showed that to?

14 A I'm not sure on that.

15 Q But the rest of the people on your bargaining table?

16 A Yes.

17 MR. WELD: No other questions of this witness, Judge.

18 JUDGE VANDEVENTER: Anything?

19 MS. FRANCIS: Just briefly.

20 RECROSS EXAMINATION

21 Q BY MS. FRANCIS: Again I am going to ask you about when you  
22 gave your affidavit. Do you recall your meeting with me?

23 A Yes.

24 Q And you recall at that time it was clear that the letter of  
25 agreement was what was in issue, correct?

26 A Correct.

1 Q And did you at any time indicate to me that Ms. Clarke came  
2 back and showed you where you circled it?

3 A No.

4 Q And it's not in your affidavit, is it?

5 A No. The question wasn't asked. I was reciting to you - I  
6 wasn't being asked pointed questions.

7 Q So you did not tell me that she came back and showed you  
8 where she circled it?

9 A No.

10 Q You didn't think it was important?

11 A No, I didn't. I actually -

12 MS. FRANCIS: No other questions.

13 MR. WELD: Nothing further, Judge.

14 JUDGE VANDEVENTER: Thank you, Mr. Hopkins, for your  
15 testimony.

16 (Witness excused from the stand.)

17 MR. WELD: Kelly Clarke please.

18 (Pause.)

19 (WITNESS SWORN: KELLY CLARKE.)

20 MS. FRANCIS: Your Honor, before we get started I notice  
21 that she has a binder with her up at the table.

22 JUDGE VANDEVENTER: You note correctly. Will counsel tell  
23 us about that?

24 MR. WELD: We asked the question of Mr. Hopkins about the  
25 binder that was used and we don't intend to offer it as evidence  
26 other than to just to show it to the judge in terms of that was

1 the vehicle that she used -

2 JUDGE VANDEVENTER: Show it to counsel first before you  
3 show it to me.

4 MR. WELD: I'm sorry.

5 (Pause.)

6 MS. FRANCIS: Is this an item that you are not going to  
7 offer this?

8 MR. WELD: I am not offering it, no.

9 MS. FRANCIS: Is it an item that she will be referring to?

10 MR. WELD: Just in terms of the discussions regarding the  
11 sidebar in terms of what she took along with her to the  
12 discussions at the sidebar.

13 (Pause.)

14 MS FRANCIS: Can I have just one moment?

15 JUDGE VANDEVENTER: Sure, let's be off the record for five  
16 minutes, and if you need more time, Ms. Francis, at the end of  
17 that time you ask for it.

18 (Whereupon, a brief recess was taken.)

19 JUDGE VANDEVENTER: We will be back on the record.

20 Go ahead please, Mr. Weld.

21 MR. WELD: Okay.

22 DIRECT EXAMINATION

23 Q BY MR. WELD: Kelly, could you spell your last name for the  
24 record please?

25 A C-L-A-R-K-E.

26 Q Okay, and your first name?

1 A Kelly.

2 Q Spell it please for the record.

3 A K-E-L-L-Y.

4 Q Are you employed by Mega Management as well?

5 A That is correct.

6 Q In what capacity?

7 A I'm the human resource director.

8 Q How long have you been the human resources director?

9 A I just hit a year.

10 Q Prior to that, what did you do?

11 A Prior to that I was the employee services director for Mega

12 East -- the east location.

13 Q The Mega East would be one of the grocery stores that is --

14 A Yes, correct.

15 Q -- run by Mega Management?

16 A Yes, one of the food markets, yes.

17 JUDGE VANDEVENTER: Wait a minute, Ms. Clark, don talk over

18 counsel. Wait until he is finished with the question. The

19 reporter can't possibly get two voices at once.

20 Okay, wait until he is totally finished and then give your

21 answer.

22 THE WITNESS: Okay.

23 Q BY MR. WELD: Let's try that again, Kelly.

24 Mega East is the grocery store located on the east side of

25 Eau Claire?

26 A Correct.

1 Q How long have you held that position?

2 A Two years.

3 Q You indicated you have been the human resources director  
4 for a year?

5 A Correct.

6 Q Do your job duties include a role in the collective  
7 bargaining process?

8 A Yes, they do.

9 Q In fact, are you the chief spokesperson for the company?

10 A That is correct.

11 Q And were you the chief spokesperson in the negotiations  
12 which lead to the 2003 contract?

13 A Yes, I was.

14 Q There has been testimony today that there were four  
15 bargaining session two of which were with Mediator Rosario. Is  
16 that accurate?

17 A That is.

18 Q And were you in attendance at all four sessions?

19 A Yes, I was.

20 Q The last session was on May 1st of this year?

21 A That is correct.

22 Q Can you describe for the judge the circumstances which lead  
23 to the ultimate settlement of the negotiations? Did the company  
24 make an offer? Did the union accept it? How did the company  
25 find out that the union was comfortable with the employer's last  
26 offer?

1 A Jose came in and let us know that the union was comfortable  
2 with the last offer that we had.

3 Q Had made?

4 A What's that?

5 Q That we had made?

6 A Yes.

7 Q And did he make any comments at that time regarding the  
8 memorandums of understanding or letters of agreement or  
9 attachments to the contract or anything along those lines?

10 A He did. He -

11 MS. FRANCIS: I object. It's hearsay.

12 JUDGE VANDEVENTER: I'm sorry.

13 MS. FRANCIS: It's hearsay.

14 JUDGE VANDEVENTER: Well, I am not going to receive it for  
15 the truth. I'm going to - I'll let her testify about it because  
16 it's part of her conversation back about which she can testify.  
17 Go ahead.

18 THE WITNESS: All the additional addendums and everything  
19 at the end was brought up.

20 JUDGE VANDEVENTER: I'm sorry. Please, Ms. Clarke, I  
21 couldn't hear that last word. Your voice dropped way down. I  
22 have no idea what the last word was.

23 THE WITNESS: It was brought up.

24 Q BY MR. WELD: Okay, how was it brought up by Mr. Rosario?

25 A He said that the addendums at the end that the union had  
26 brought up that they had some issues with them and we asked them



1 did they have issues with the existing ones or new ones? He  
2 said he wasn't quite sure. We should take the sidebar and  
3 discuss it.

4 Q By issues at the end, you are talking about the memorandums  
5 of understanding and letters of agreement?

6 A Correct.

7 Q Now was the letter of agreement attached to the contract  
8 that you were using?

9 A It was.

10 Q And that's because it was in play since 2001?

11 A That's true.

12 Q To determine what wage rates were offered to the employees  
13 in both 2001 and 2002?

14 A Yep.

15 Q And, in fact, paragraph no. 5 was the clarification  
16 paragraph of 101(b) that was also utilized in your tenure as  
17 human resources director, was it not?

18 A Yes, it was.

19 Q Now did the management bargaining team discuss the  
20 addendums to the contract prior to you going into the sidebar?

21 A Yes, we did.

22 Q Could you describe for the Judge what you talked about?

23 A We had basically talked about how we wanted them to be  
24 included specifically the letter of agreement.

25 Q The letter of agreement would be General Counsel No. 15?  
26 (Witness proffered document.)

1 A Correct. That's correct.

2 Q And the management committee specifically discussed the  
3 need for that letter of agreement to be incorporated in the new  
4 contract -

5 A Yes.

6 Q -- prior to your going into the sidebar?

7 A Yes.

8 Q Now, did you go into a sidebar with Mr. Rosario and Mr.  
9 Hudyma?

10 A Yes, we did.

11 Q And where did that sidebar conversation occur?

12 A It was in the hallway of the hotel.

13 Q Did you take anything with you for that meeting?

14 A Yes, this is the binder that I took with me out in the  
15 hall.

16 Q You are pointing to the blue binder that you brought to the  
17 desk that counsel just looked at?

18 A Correct.

19 Q And did that binder include your collective bargaining  
20 agreement for the period 1998-2003?

21 A Yes, it did.

22 Q Can you describe for the judge what was discussed in the  
23 sidebar? Who said what to who? First off, how long did that  
24 meeting occur?

25 A Probably a couple minutes.

26 Q And could you describe who said what first?

1 A I do believe I initiated the conversation.

2 Q And what did you say?

3 A I said that we wanted clarification on whether or not the  
4 issue that the union had was with the current memorandums and  
5 additions that were in there or if it was with any new  
6 memorandums or additions.

7 Q Okay.

8 A And then I proceeded to say because this memorandum - the  
9 letter of understanding we need that in there and I circled  
10 number five and I said we need that in there because of this  
11 reason.

12 Q Okay. I am showing you a document which will be identified  
13 as Respondent's No. 1, I believe.

14 (Witness proffered document.)

15 Q In response to my last question you indicated that you  
16 showed a document to Mr. Hudyma?

17 A Yes, I showed the letter of agreement.

18 Q The letter of agreement, which is identified as  
19 Respondent's No. 1, which is also General Counsel No. 15?

20 A Correct.

21 Q And you indicated that - what did you say to him about  
22 paragraph no. 5?

23 A I said the reason why we needed to keep every - all the  
24 additional memorandums and additions in there is because of  
25 letter - no. 5 in the letter of agreement and I circled it. I  
26 said, "This is something that we need to keep in the contract."

1 Q And you circled it in front of Mr. Hudyma?

2 A Yes, I did.

3 Q He saw you circle it?

4 A Yes.

5 Q He's testified today that he didn't see you circle it. Did  
6 you circle it?

7 A Yes, you did.

8 Q And you talked about that specifically in your sidebar  
9 conversation?

10 A Yes, we did.

11 Q Okay, what was Mr. Hudyma's response when you said  
12 paragraph 5 of letter agreement needed to be incorporated in the  
13 new contract?

14 A He said that's not the addition or memorandum that I have a  
15 problem with.

16 Q Did you lead to believe that he was comfortable with the  
17 inclusion of paragraph 5 of the letter of agreement as an  
18 addendum to the new contract?

19 A Correct.

20 Q And you relied on that subsequently?

21 A Yes.

22 Q What did Mr. Hudyma say was of concern to him?

23 A It was the memorandum that talks about 4.8 - some other  
24 issues in the contract. And he said that there's something in  
25 there that disagreed with what we just agreed to right in the  
26 contract in regards to seniority.

1 Q Let's take a look at General Counsel No. 2. Do you have  
2 General Counsel No. 2 in front of you?

3 (Witness proffered document.)

4 A Yes, I do.

5 Q And you turned to page 25, is that correct?

6 A Yes.

7 Q And that makes reference to a series of articles in the  
8 contract including Section 4.2?

9 A Correct.

10 Q Is that the provision that Mr. Hudyma indicated he had  
11 concern about?

12 A Yes.

13 Q What did he say specifically? Which of the four paragraphs  
14 was he concerned about?

15 A I asked him that question. I said, "What in here is what  
16 you have a problem with as far as disagreeing with seniority?"  
17 And he said, "I have a migraine. I can't see right now. I have  
18 had it for two hours. So I can't show you in there what I'm  
19 talking about."

20 Q So, what did you say?

21 A So then I said, "Well, we will agree then that if there is  
22 something in there that does not agree with what we said to put  
23 into the contract in regards to seniority that it would be  
24 removed from that memorandum."

25 Q Okay, and that's the memorandum which is found on page 25  
26 of General Counsel Exhibit No. 2?

1 A Correct.

2 Q Did you discuss any of the other memorandum of  
3 understandings which are located in General Counsel No. 2?

4 A No. Just those two in the sidebar.

5 Q The letter of agreement and page 25 of General Counsel No.  
6 2?

7 A Correct.

8 Q What was your understanding regarding the letter of  
9 agreement when you returned to the management caucus?

10 A That it was to be included in the contract.

11 Q And did you return to the caucus directly after your  
12 sidebar conversation?

13 A I don't recall if it was directly after. I might have gone  
14 into the big room that the union was in but it was shortly  
15 thereafter.

16 Q And did you talk about what you had discussed in the  
17 sidebar conversation?

18 A Yes, I did.

19 Q And what did you tell the management team?

20 A I told the management team that the union was fine with  
21 keeping all of the memorandums in place. I did explain to them  
22 that there might be something in that memorandum that's on page  
23 25 that conflicts with the seniority agreement that we just  
24 talked about and if it does, then we will strike it from that  
25 memorandum.

26 Q Did you also talk about the letter of agreement and whether

1 it would be included or excluded from the new contract?

2 A Yes. We discussed that the letter of agreement would be  
3 included in the contract.

4 Q Specifically we are talking about Respondent's No. 1 of  
5 paragraph 5?

6 A Correct.

7 Q Following the May 1st bargaining session did you draft the  
8 collective bargaining agreement?

9 A Yes, I did.

10 Q You sent Mr. Hudyma a draft on or about May 9th, did you  
11 not?

12 A Yes, I did.

13 Q Did you use the correct template in drafting the new  
14 contract?

15 A We were using the '92 template. We didn't have the '99 on  
16 file as far as in the computer.

17 Q Did you ultimately correct that error?

18 A Yes.

19 Q Because you used the '92 - maybe you could explain to the  
20 judge how you transmitted the draft contract to the union? Did  
21 you do it by e-mail?

22 A Yes, I did.

23 Q And did you attempt to get a file out of your predecessor's  
24 records?

25 MS. FRANCIS: I'm going to object. He's leading.

26 Q BY MR. WELD: How did you - where did you find the contract

1 that you forwarded to Mr. Hudyma?

2 A I found that in previous files from actually two  
3 predecessors before me.

4 Q And did you as a result of - did you correct that  
5 subsequently?

6 A Yes. Well, we made the changes to that one to reflect the  
7 changes that we had discussed in negotiations and the changes in  
8 the '98 contract.

9 Q When did you discover that the letter of understanding had  
10 not been e-mailed to - the letter of agreement had not been e-  
11 mailed as part of your contract draft to Mr. Hudyma?

12 A I don't remember the exact date but it was - we were going  
13 to - there were so many issues because I was using the '92  
14 contract initially to make the '98 changes and then to make the  
15 changes that we discussed in negotiations. There were so many  
16 changes that Dan was bringing up that had changed from the '92  
17 to the '98 that my assistant, Lynette, and I started reading it  
18 back and forth to each other so that we made sure that we -  
19 which was actually Dan's suggestion - made sure that all the  
20 changes were in there correctly between the '98 contracts and  
21 this new one that I had drafted up. In the course of doing that  
22 got to the end and realized that the letter of agreement was not  
23 in what I was sending Dan. I thought that the whole time that  
24 it was just attached in there because it was part of the  
25 contract.

26 Q In fact it was the 2001 letter of agreement that was not



1 attached to either the '92 or the '98 draft of the contract?

2 A Correct.

3 Q Did you identify that the fact that the letter of agreement  
4 needed to be attached to Dan?

5 A I do believe I did.

6 Q What was his response?

7 A That he did not believe that that was part of what we  
8 negotiated.

9 Q Did you remind him about the sidebar conversation?

10 A Yes, I did.

11 Q What was his response?

12 A The sidebar - I'm not sure what his response was exactly.  
13 He definitely indicated he did not think that was part of  
14 negotiations.

15 Q Do you think it was part of the negotiations?

16 A Yes, I do.

17 Q And why is that?

18 A Because we talked about it.

19 Q Where?

20 A In that sidebar.

21 Q Was it your understanding that paragraph no. 5 of the  
22 letter of agreement would be incorporated in the new contract?

23 A Yes.

24 Q And Mr. Hudyma agreed to that on behalf of the union?

25 A Yes. He said he didn't have an issue with paragraph 5 when  
26 I circled it.

1 MR. WELD: I have no other questions of this witness,  
2 Judge.

3 JUDGE VANDEVENTER: Okay, Ms. Francis, you may -

4 MR. WELD: I would like to move Respondent's No. 1, Judge.  
5 I don't think I did that.

6 JUDGE VANDEVENTER: You did not. Any objection to  
7 Respondent's 1?

8 MS. FRANCIS: The only objection is that it's redundant.  
9 It actually is already in evidence.

10 JUDGE VANDEVENTER: I realize that but it's one piece of  
11 paper. For one piece of paper I'll allow redundancy. It gets a  
12 lot more I don't.

13 MS. FRANCIS: Okay. And I also just again want to clarify  
14 the one General Counsel has offered is in fact the same - I  
15 mean, with the circle it's the one that he stipulated that he  
16 gave to me.

17 JUDGE VANDEVENTER: Can you stipulate that it's the same as  
18 one of the pages on General Counsel 15?

19 MS. FRANCIS: Actually the stipulation is that it's one  
20 provided to General Counsel by Respondent.

21 JUDGE VANDEVENTER: Oh, all right.

22 MR. WELD: We did provide General Counsel with 15. That's  
23 correct.

24 JUDGE VANDEVENTER: 15. And page 1 of 15 is identical to  
25 Respondent's 1?

26 MR. WELD: I don't know if it's identical, Judge. Both of

1    them have a circle around paragraph 5.

2           JUDGE VANDEVENTER:   Okay.   In that regard it's identical.  
3   Okay.   That stipulation is received and so is Respondent's 1.  
4   (EXHIBIT RECEIVED:   RESPONDENT'S NO. 1.)

5           JUDGE VANDEVENTER:   Go ahead.

6                                   CROSS EXAMINATION

7   Q     BY MS. FRANCIS:   Ms. Clarke, you have been human resources  
8   director for just about a year now?

9   A     Correct.

10  Q     So you had been only in your position for about six months  
11  when you started negotiations, is that right?

12  A     That's correct.

13  Q     And you testified that when you had your binder with you in  
14  a sidebar conversation you actually circled no. 5?

15  A     Correct.

16  Q     And that's why General Counsel's 15 and Respondent's 1  
17  shows a circle on no. 5?

18  A     Correct.

19  Q     Are there any other circles or markings on any of the  
20  documents you had during negotiations?

21  A     Yes.

22  Q     You testified that this letter of agreement was important  
23  to Respondent in - it's something that you guys - your group had  
24  talked about before going into the sidebar, is that right?

25  A     Correct.

26  Q     And you testified that you told Hudyma that it had to stay,

1 is that right?

2 A Correct.

3 Q Because this was something quite important to Respondent?

4 A Correct.

5 Q Yet when you fixed the - when you made the changes to the  
6 draft of the contract or the new contract that you negotiated  
7 and e-mailed those to Mr. Hudyma, it was not attached?

8 A That's correct.

9 Q Did you not read through it all?

10 A I didn't scroll down that far, no. I didn't look at any of  
11 the memorandums that were in there actually.

12 JUDGE VANDEVENTER: I didn't hear that at all. Please  
13 speak up, Ms. Clarke.

14 THE WITNESS: I didn't scroll down that far. I didn't look  
15 at any of the memorandums that were in there. There was no  
16 changes to be made so I didn't look at those. No.

17 Q BY MS. FRANCIS: There were no changes to be made to any of  
18 the memorandums?

19 A Correct.

20 Q But, in fact, you did change the letter of agreement?

21 A Correct.

22 Q When did you do that?

23 A I don't remember the exact date. It was when I noticed it  
24 was missing.

25 Q So when you noticed it was missing after you e-mailed the  
26 two other drafts -- the May 9th and May 14th draft, right?

1 A Correct.

2 Q And is that the first time that you printed it out to  
3 actually read through it?

4 A Yes, that was the first time - the whole contract?

5 Q Yes.

6 A Yes to read it in its entirety. Otherwise I was working  
7 mostly off the computer.

8 Q So when you realized this when you were going through your  
9 - the contract - reading through it with your assistant,  
10 Lynette, how did you notify Mr. Hudyma that I made a mistake. I  
11 should have included this in all those other drafts?

12 A I actually think he may have notified me first. It was a  
13 matter of days. Like one or two days that we were going back  
14 and forth on - the '92 language did not match with the '98  
15 contract and did not match and so we were going back and forth  
16 over a course of two days. It was pretty close there.

17 Q Isn't it true that the only way you notified him is by  
18 including it on the final draft you sent him in the mail?

19 A Yeah, that might be correct. I don't think we discussed it  
20 before he got that in the mail.

21 Q And when you had this final draft you sent him in the mail  
22 that had the signatures on it and had the new letter of  
23 agreement attached signed, that's a letter of agreement that you  
24 actually made changes to on the computer then?

25 A Correct. The dates and the irrelevant things were taken  
26 out.

1 Q Is that the only change you made is to dates?

2 A No.

3 Q So you made other changes to the letter of agreement as  
4 well?

5 A Yes. The irrelevant things were taken out.

6 Q And who determined whether they were relevant or not?

7 A I did.

8 Q And you didn't bother to notify Mr. Hudyma of any of this?

9 A No.

10 Q Where did you physically locate the copy of the letter of  
11 agreement?

12 A It was in the computer file on a different drive than the  
13 contract was on.

14 Q And how did you make the changes?

15 A You are talking how did I -

16 Q Physically.

17 A By typing them.

18 Q Did you take - did you find the draft of the letter of  
19 agreement in a different computer file and update that one as  
20 you had been doing with the computers? Or did you type a new  
21 one?

22 A I do believe I updated the one I found. I am not a hundred  
23 percent sure of that.

24 (Pause.)

25 Q I apologize for not recalling if you testified to this but  
26 I do - I know that you were in the room when Mr. Hopkins

1 testified, is that right?

2 A That's correct.

3 Q And he mentioned that during negotiations Mr. Hudyma said,  
4 "I've only made two mistakes" and he referenced the letter of  
5 agreement. Is that your recollection as well?

6 A That's correct. Yes.

7 Q So you recall him saying that he thought that was a mistake  
8 yet you contend that in your sidebar conversation when you  
9 pointed out to no. 5 in particular then he said that's fine with  
10 him?

11 A Yeah.

12 Q And it wasn't a mistake any longer?

13 A Correct.

14 (Pause.)

15 Q Excuse me, Ms. Clarke, I've handed you a piece of paper  
16 which I'll have marked as General Counsel Exhibit 17. And I  
17 apologize it's a poor quality copy. But do you recognize it?  
18 (Witness proffered the document.)

19 A Yes, I do.

20 Q And what is it?

21 A It's a memo that I wrote to the union employees explaining  
22 where we were at with the negotiations.

23 Q And do you reference the letter of agreement in that?

24 A Yes, I do.

25 Q And you admit that you had forgotten to attach it, is that  
26 right?

1 A Correct.

2 MS. FRANCIS: I offer General Counsel Exhibit 17.

3 MR. WELD: No objection.

4 JUDGE VANDEVENTER: 17 is received.

5 (EXHIBIT RECEIVED: GENERAL COUNSEL'S NO. 17.)

6 Q BY MS. FRANCIS: When you were reading through this draft  
7 of the contract that you finally printed out and finally  
8 realized that letter of agreement wasn't attached, did you tell  
9 anyone else that you had made this mistake?

10 A Yeah, I do believe I told Brick and Rick also.

11 Q And at this time --

12 JUDGE VANDEVENTER: Brick and whom?

13 THE WITNESS: Rick.

14 JUDGE VANDEVENTER: Rick? Brick and Rick? What's Rick's  
15 last name?

16 THE WITNESS: Lambract.

17 JUDGE VANDEVENTER: Thank you.

18 Q BY MS. FRANCIS: So this was the end of May - beginning of  
19 June I would assume is the correct point in time when you  
20 finally realized this error?

21 A I believe so. I'm not sure of the exact date.

22 Q How long had you been employed in your position at that  
23 point?

24 A I do believe right around six months like you stated.

25 Q You had only been in your position for six months and  
26 realized that you made a pretty big error. That must have been



1 embarrassing for you, wasn't it?

2 A I didn't view it as embarrassing because it was part of the  
3 contract before. So -

4 Q So it didn't embarrass you that you hadn't bothered to  
5 attach it to any of the other copies you sent to the union?

6 A I wouldn't say it embarrassed me. I definitely made - I  
7 mean I didn't attach it. I made a mistake. I will definitely  
8 say that.

9 Q And it didn't embarrass you to have to tell Brick and Rick  
10 about this mistake you made?

11 A No.

12 Q It wasn't an issue at all?

13 A Not really. I make mistakes.

14 Q But it's turned out to be quite a big mistake in fact  
15 hasn't it?

16 A It has.

17 (Pause.)

18 MS. FRANCIS: May I just have one minute?

19 JUDGE VANDEVENTER: Sure you may. We will be off the  
20 record.

21 (Brief recess taken.)

22 JUDGE VANDEVENTER: On the record.

23 Go ahead please.

24 Q BY MS. FRANCIS: When you learned there was a dispute as to  
25 what happened in the sidebar conversation with yourself, Mr.  
26 Hudyma, and where Mr. Rosario was present, did you contact Mr.

1 Rosario about that?

2 A Yes, I did.

3 Q And was he able to substantiate your version of events?

4 A No, he was not.

5 MS. FRANCIS: I have no further questions.

6 JUDGE VANDEVENTER: Redirect?

7 MR. WELD: Nothing further with this witness, Judge.

8 Bill Ripley please.

9 JUDGE VANDEVENTER: Hang on a minute. Let me see - I may  
10 have something I want to ask her.

11 I think there were a couple of questions on this but let me  
12 see if you can remember. Did you know when the ratification  
13 vote was going to be taking place? Were you aware of the day of  
14 the ratification vote of the contract taking place in May of  
15 this past year?

16 THE WITNESS: Yeah, I do believe I knew.

17 JUDGE VANDEVENTER: See if you can remember when you  
18 discovered this error of leaving out the letter of  
19 understanding?

20 THE WITNESS: It was after that - the ratification.

21 JUDGE VANDEVENTER: It was after the ratification?

22 THE WITNESS: Yes.

23 JUDGE VANDEVENTER: And I'm also looking at the - let's  
24 call it the June 2nd draft of - it doesn't have a date on it  
25 other than on the final page which is the letter of agreement.  
26 It's General Counsel Exhibit 10 I should say. It has a date.

1 It says by Margaret Melrose 5/28/03 on the back page. Who is  
2 Margaret Melrose?

3 THE WITNESS: Margaret is the Board President - the Board  
4 of Directors for Consumers Co-op.

5 JUDGE VANDEVENTER: And so do you have any independent  
6 knowledge of whether she signed it on the 28th or not? The 28th  
7 of May. This document.

8 THE WITNESS: I do believe so.

9 JUDGE VANDEVENTER: Do you know how it got to Ms. Melrose?  
10 Did you give it to her? How did a draft get to the Board?

11 THE WITNESS: It was brought to the meeting.

12 JUDGE VANDEVENTER: I'm sorry?

13 THE WITNESS: It was brought to the meeting that they had.

14 JUDGE VANDEVENTER: Okay, do you know when that was? In  
15 other words, do you know when you gave this to the Board of  
16 Directors? This document that is GC-10.

17 THE WITNESS: If the 28th is on a Wednesday, then it was  
18 the 28th.

19 JUDGE VANDEVENTER: It was that very day as far as you  
20 recall?

21 THE WITNESS: Yeah.

22 JUDGE VANDEVENTER: And so some time - your best  
23 recollection is some time between the 22nd and the 28th is when  
24 you realized you did not put the letter of understanding on?  
25 Can you get it anymore detailed between the ratification vote  
26 and the day you gave it to the Board of Director? Do you know

1 in that six days when it might have been?

2 THE WITNESS: It was either that day of the Board meeting  
3 or the day before I do believe.

4 JUDGE VANDEVENTER: Okay. Thanks. That's all.

5 MR. WELD: Just maybe to clarify -

6 JUDGE VANDEVENTER: You may. You may have questions on  
7 anything I asked.

8 REDIRECT EXAMINATION

9 Q BY MR. WELD: The Board of Directors meets on a monthly  
10 basis, does it not?

11 A Correct.

12 Q And on the fourth Wednesday of each month?

13 A I do believe so.

14 Q And Ms. Melrose signed the contract on May 28th which would  
15 have been the fourth Wednesday of May?

16 A Correct.

17 Q Was that subsequent to a Board vote on ratification of the  
18 collective bargaining agreement?

19 A They voted that day.

20 Q And Ms. Melrose, as president of the Board of Directors,  
21 signed the document for your forwarding it to the union?

22 A Yes.

23 Q So picking up on the Judge's question somewhere between the  
24 union ratification vote and the Board of Director's ratification  
25 vote is when you discovered the scrivener's error?

26 A Correct.

1 MR. WELD: No other questions, Judge.

2 JUDGE VANDEVENTER: Okay. Anything from you Ms. Francis?

3 MS. FRANCIS: I have nothing further.

4 JUDGE VANDEVENTER: Thank you. You may step down, Ms.

5 Clarke.

6 (Witness excused from the stand.)

7 (WITNESS SWORN: BILL RIPLEY.)

8 DIRECT EXAMINATION

9 Q BY MR. WELD: Mr. Ripley, could you spell your last name  
10 for the record please?

11 A R-I-P-L-E-Y.

12 Q Are you also employed by Mega Management?

13 A Yes.

14 Q In what capacity?

15 A I am store director of Mega Pick and Save East.

16 Q And in your role as store manager did you participate in  
17 negotiations which lead to the 2003 collective bargaining  
18 agreement?

19 A Yes, I did.

20 Q Were you at all the sessions?

21 A Yes.

22 Q In fact, did you serve as the scrivener for the employer?

23 A Yes, I did.

24 Q Were you in attendance at the March 13th bargaining session  
25 in which Mr. Hudyma discussed Section 2.4 of his proposals?

26 A Yes.

1 Q And can you describe for the arbitrator - judge what was  
2 said?

3 A He said that it was one of two mistakes he's made in his  
4 life was regarding signing the letter of agreement.

5 Q And that was referencing the 2001 letter of agreement?

6 A Correct.

7 Q And his proposal, Section 2.4 was designed to correct that  
8 situation?

9 A Yes.

10 Q You were at the April 10th session with Mediator Rosario?

11 A Yes.

12 Q Now it has been testified that at the end of that session  
13 Mr. Rosario asked the parties to focus on five issues?

14 A That is correct.

15 Q And did the parties focus on those five issues at the May  
16 1st mediation session?

17 A Yes, we did.

18 Q During the course of that session did the employer make a  
19 counterproposal to the union which ultimately was acceptable to  
20 the union?

21 A Yes, it was acceptable to the union. Jose came back into  
22 the room and said, "It's accepted but there is a question on the  
23 addendums at the end of the contract."

24 Q And what was the question on the addendums that Mr. Rosario  
25 identified?

26 A There was a question on one of the addendums regarding

1 seniority because of the new contract some of the wording was  
2 going to supersede what was in the addendums. Our question was  
3 is Dan had a concern about any additional new addendums because  
4 since the last contracts we would always somehow come up with  
5 additional addendums after. Dan did not want that to happen  
6 anymore. So our understanding in the group was we wanted to  
7 make sure that all the new - the existing addendums that were  
8 still in place - our question that we wanted to ask back was  
9 what about the existing. We understood it to be only new  
10 addendums not added.

11 Q Now did you consider the letter of agreement which had been  
12 negotiated in 2001 as an existing letter of agreement?

13 A Yes.

14 Q Existing addendum - I'm sorry.

15 A Yes. That was very important because of the addition of  
16 the Chippewa Falls store.

17 Q There has been testimony that Mr. Rosario called for a  
18 sidebar conference with Ms. Clarke and Mr. Hudyma, is that  
19 accurate?

20 A That is accurate.

21 Q Can you describe for the judge the discussions which  
22 preceded Ms. Clarke going into the sidebar conversation?

23 A Brick had been one of the authors of the letter agreement  
24 or signers of the letter agreement and also being very actively  
25 involved in the purchase of the Chippewa facility knew that that  
26 letter agreement was very important to his contract that it

1 still remained. So that was specifically brought up that we  
2 wanted to make sure that all the things were okay including that  
3 letter of agreement which -

4 Q The letter of agreement has been referenced here today as  
5 General Counsel No. 15, is that correct?

6 A Correct.

7 Q Maybe you should take a look at that.

8 (Witness proffered the document.)

9 A Yes, that is correct.

10 Q And that discussion was had in the employer's caucus just  
11 prior to Ms. Clarke going into the sidebar?

12 A Yes, it was.

13 Q Did Ms. Clarke return - first off, did Ms. Clarke go to the  
14 sidebar conversation?

15 A Yes, she did.

16 Q And did she return?

17 A Yes, she did.

18 Q How long after did she return?

19 A Three minutes - four minutes.

20 Q It was a short caucus?

21 A Short caucus - sidebar.

22 Q And what did she report regarding the discussion she had  
23 had with Mr. Hudyma?

24 A She reported that all existing addendums were okay. There  
25 would be no new additional addendums. There was a question on  
26 seniority.



1 Q Okay.

2 A She also specifically said that she made reference to the  
3 letter of agreement and I guess she said I signed - even circled  
4 and said we're talking about this and he said no I'm talking  
5 about there is an issue on - over here regarding seniority. She  
6 asked - she said she had asked Dan to - which paragraph  
7 specifically. And I remember it because it was kind of - Dan  
8 had a migraine and couldn't really point out which line it was  
9 on.

10 Q I'm going to show you a document which I'm going to have  
11 identified as Respondent's No. 2. Can you identify that three  
12 page document, Bill?

13 (Witness proffered document.)

14 A Yes, I do. Those are the notes that I took from the very  
15 first bargaining -

16 Q Did you keep those contemporaneously through the course of  
17 the bargaining session?

18 A Yes, I did.

19 Q And you are the author of the document?

20 A Yes, I am.

21 Q There is a reference on page 3 to below a squiggly line - a  
22 reference to no more new addendums.

23 A Yes, there is.

24 Q Is that something you wrote?

25 A I did write that.

26 Q Why did you write that?

1 A I wrote that because after Kelly came back and said that  
2 all existing addendums were Okayed except for the clarification  
3 purposes on seniority that we had agreed to no more new  
4 addendums.

5 MR. WELD: I move the admission of Respondent's 2, Judge.

6 JUDGE VANDEVENTER: General Counsel?

7 MS. FRANCIS: No objection.

8 JUDGE VANDEVENTER: 2 is received.

9 (EXHIBIT RECEIVED: RESPONDENT'S NO. 2.)

10 MR. WELD: No other questions of this witness, Judge.

11 JUDGE VANDEVENTER: Cross, Ms. Francis?

12 CROSS EXAMINATION

13 Q BY MS. FRANCIS: You also felt that the letter of agreement  
14 was something that was very important to the contract, is that  
15 right?

16 A Yes.

17 Q And it's your testimony that it's something that was  
18 specifically talked about in the employer's room before the  
19 sidebar?

20 A Correct.

21 Q And something specifically talked about in the employer's  
22 room after the sidebar?

23 A Yes.

24 Q So it was very clear to Ms. Clarke at least that this was  
25 an important document to Respondent - to yourselves, is that  
26 right?

1 A Could you repeat the question?

2 Q So it was very clear to Ms. Clarke that this letter of  
3 agreement was very important to you?

4 A Yeah.

5 Q When did you first learn that it hadn't been attached to  
6 any of the - to the May 9th or May 14th drafts of the contract?

7 A I learned quite sometime after as I was asking about why  
8 the wages - new wages had not gone into effect yet because as we  
9 - the contract had been ratified. We were having employees  
10 coming to my door asking why the wages had not gone into effect  
11 yet and I say I don't know. That's when I found out that Dan  
12 had refused to sign based on that point of the -

13 Q And is that when you found out that Ms. Clarke had not  
14 included it on the prior drafts?

15 A Yes.

16 Q And you had - you testified you just had employees coming  
17 up and questioning about issues with the contract?

18 A That is correct.

19 Q Since that time have the wage increases gone through?

20 A Yes, they have.

21 Q Have other portions of the contract been implemented?

22 A No, not that I'm aware of.

23 MS. FRANCIS: No further questions.

24 JUDGE VANDEVENTER: Any redirect?

25 MR. WELD: None, Judge.

26 JUDGE VANDEVENTER: Let me ask this witness - unless the

1 parties want to stipulate it - about how many stores are there  
2 in the two county area we are talking about, Eau Claire and  
3 Chippewa?

4 THE WITNESS: That we -

5 JUDGE VANDEVENTER: That are under this contract.

6 THE WITNESS: That are under this contract. Two food  
7 stores and nine convenience stores and two lube and oils.

8 JUDGE VANDEVENTER: Approximately 11 or 13 when you - were  
9 the last two -

10 THE WITNESS: 13 facilities.

11 JUDGE VANDEVENTER: Facilities. And, if you know, can you  
12 give me an approximate number of employees that are employed at  
13 those 13 facilities?

14 THE WITNESS: 600.

15 JUDGE VANDEVENTER: That's all I wanted to know.

16 Any questions on mine?

17 MR. WELD: Not for the employer, Judge.

18 MS. FRANCIS: No.

19 MR. WELD: The employer rests, Judge.

20 JUDGE VANDEVENTER: Okay, thank you.

21 It's five - it's just about the noon hour. First of all,  
22 let me ask is there anything further from General Counsel?

23 MS. FRANCIS: I'm sorry. Could you speak up a bit?

24 JUDGE VANDEVENTER: I do apologize once again. I'm not  
25 usually this soft-spoken. Is there anything else from General  
26 Counsel on rebuttal or any other trial matter?

1 MS. FRANCIS: Could I just have one minute?

2 JUDGE VANDEVENTER: You may have a minute to think about  
3 it, yes. We will be off the record.

4 (Brief recess taken.)

5 JUDGE VANDEVENTER: On the record.

6 I have asked the parties to present oral arguments on both  
7 the facts and the law to me. We will give them some time to  
8 organize that as well as some lunch time which even if they  
9 don't need, I do. It would be helpful to me if the parties  
10 would address of course the credibility issue that we have and  
11 argue that. I know that you are going to do that.

12 The parties - it would be helpful if the parties - each  
13 party would also address both sides of that credibility issue  
14 for the witness that you presented or the witness that the other  
15 side presented. What does that - what effect, if any, does that  
16 have on your argument? Otherwise I am going to leave the  
17 arguments to you.

18 And we will resume at 1:30 for those arguments. Thank you.  
19 (Whereupon, at 12:00 p.m., the hearing was recessed for lunch to  
20 resume this same day, September 30, 2003, at 1:30 p.m.)

21 A F T E R N O O N S E S S I O N

22 1:30 p.m.

23 JUDGE VANDEVENTER: On the record.

24 Good afternoon.

25 After lunch we are here to hear arguments from each party.

26 Is there anything any party wants to add before we go to

1 argument?

2 (No response.)

3 JUDGE VANDEVENTER: No?

4 Okay, Ms. Francis, would you tell us what the General  
5 Counsel's argument is please?

6 MS. FRANCIS: By its express terms Section 8(d) requires  
7 the execution of a written agreement if requested by either  
8 party. The law is quite clear. Mr. Hudyma has indicated he is  
9 willing to sign the contract as negotiated. Respondent however  
10 has conditioned its execution on the inclusion of a letter of  
11 agreement.

12 The facts are largely undisputed. An outcome of the case  
13 comes down to an issue of credibility between Mr. Hudyma of the  
14 Union and Ms. Clarke of the Respondent and what was discussed  
15 between the very brief sidebar conversation on May 1st. Ms.  
16 Clarke contends that during the conversation the letter of  
17 agreement was specifically discussed and that she even circled  
18 No. 5 on the letter of agreement and Mr. Hudyma responded, "I  
19 don't have a problem with that." Contrary to Ms. Clarke's  
20 testimony Mr. Hudyma testified that the sidebar conversation  
21 related to only one memorandum of understanding, the one on  
22 interpretive notes on which they agreed that the one attached to  
23 the 1998 collective bargaining agreement could remain but no new  
24 ones would be accepted. They also agreed that anything in the  
25 interpretive notes in conflict with the contract as just  
26 negotiated the contract would take precedence. Hudyma credibly

1 testified that the letter of agreement was not discussed during  
2 the sidebar. Hudyma also specifically denied seeing Ms. Clarke  
3 circle anything in her binder. The facts as presented warrant  
4 crediting Hudyma over Clark.

5 Specifically, Hudyma's account is supported by the  
6 following facts. First, it is undisputed that the letter of  
7 agreement was not attached to the May 9th or May 14th drafts of  
8 the contract. Had this document - which all of Respondent's  
9 witnesses testified was very important to them - had it been  
10 agreed to it should have been included in those drafts of the  
11 contract.

12 Next, the record evidence clearly establishes that the  
13 letter of agreement that was actually attached to the June  
14 contract, the final contract with signatures, is not even the  
15 same as the 2001 letter of agreement the parties entered into.  
16 Clarke testified that she changed it and did so without  
17 bothering to contact or consult with the Union.

18 Regarding other memorandums of understanding that were  
19 attached to the 1998 contract the parties specifically discussed  
20 the one concerning employee's scheduled hours and agreed to  
21 incorporate that language to the seniority provision. The  
22 memorandum of understanding regarding interpretive notes was  
23 also specifically agreed to by the parties during negotiations  
24 and they agreed that it would remain in the new contract.  
25 Therefore, it's clear that the parties - that when the parties  
26 intended to carry forward a memorandum of understanding or other

1 addendum they discussed it and reached agreement. That did not  
2 happen with the letter of understanding - the letter of  
3 agreement.

4 Although the memorandum of understanding concerning the  
5 employees in the meat department was not discussed and was  
6 included in those first two drafts Hudyma testified that it was  
7 of no consequence either way whether or not that was included in  
8 the contract and that it only runs in the favor of the Union.  
9 So he did not raise it as an issue.

10 The evidence does not support Ms. Clarke's and Respondent's  
11 version of events. In support of Respondent's assertion that  
12 the letter of agreement was discussed between Clarke and Hudyma  
13 in the sidebar Respondent relies on the circled mark on the  
14 letter of agreement. It contends that Clarke circled this while  
15 discussing the letter of agreement in that brief sidebar  
16 conversation with Hudyma. Hudyma specifically denied that this  
17 happened.

18 Respondent further relies on - this witness has further  
19 testified that the letter of agreement was referenced by Hudyma  
20 in the beginning of negotiations when he told him that it was  
21 one of two mistakes he's made. Hudyma identified it as  
22 something he regretted. Yet Respondent and Clarke expect that -  
23 expect us to believe that during the sidebar conversation when  
24 Clarke showed him the letter of agreement now he had no problem  
25 with it and said, "That's fine." That's just - it's simply not  
26 creditworthy that an issue that he already admitted was a



1 mistake is now not going to be a problem. He is not going to  
2 put up any protest and just say that's fine. That's the only  
3 evidence that the parties have that the parties discussed this  
4 letter of agreement.

5 Respondent further relies on the conversation among the  
6 employer's representatives before and after the sidebar.  
7 Clarke, Hopkins, and Ripley testified that the letter of  
8 agreement was an important issue they discussed prior to Clarke  
9 going to the sidebar and something she specifically referenced  
10 when she returned. Hopkins even testified that she pointed to  
11 where that - Clarke pointed to where she circled it in her  
12 notes. Yet he did not mention this important fact supportive of  
13 their version when providing an affidavit to the Board. In fact  
14 at the time of this affidavit Mr. Hopkins stated, "Clarke came  
15 back after the sidebar and reported he's fine with the existing  
16 agreements. It's only with anything new that he had a problem  
17 with and that we weren't going to add anything new. There was  
18 nothing else said." Now, however, he remembers a letter of  
19 agreement being specifically discussed. Mr. Hopkins' testimony  
20 is demonstrated as not being credible.

21 Significantly, despite Ms. Clarke's and Respondent's other  
22 witness' testimony of the extreme importance of including the  
23 2001 letter of agreement in the contract, Ms. Clarke did not  
24 attach letter of agreement to the May 9th or May 14th contract  
25 and never even bothered to review the documents she sent to  
26 Hudyma to ensure it contained this very important document.

1           During this time when Ms. Clarke was making the changes to  
2   the contract and updating the language and dates, she was  
3   sending drafts to Mr. Hudyma and during that time the e-mails  
4   between Hudyma and Clarke indicate that Section 1.1(b) which is  
5   modified by the letter of agreement was actually an issue. She  
6   was making mistakes in her contract on that section. Clarke  
7   admittedly had been using the pre 1998 language and Mr. Hudyma  
8   repeatedly pointed it out. The errors were not insignificant as  
9   it added an entire county as was negotiated in 1998. So, this  
10   section was clearly at the forefront of Ms. Clarke's mind, yet  
11   she never bothered to look to see that the agreement that  
12   modifies that section was attached to the contract and was  
13   provided to Respondent. General Counsel submits that it is  
14   because Clarke was unaware of the letter of agreement at the  
15   time, that she had only been in her position for 6 months during  
16   this time.

17           As for the outcome of the case -- as the outcome of the  
18   case turns on credibility and each person's memory of the  
19   sidebar, General Counsel would just note that the e-mails in  
20   evidence indicate that this is not the first time Ms. Clarke's  
21   memory was not correct regarding negotiations. The parties also  
22   had a dispute as to what was agreed upon during negotiations  
23   regarding health insurance. Ms. Clarke believed that it was a 6  
24   month waiting period and Mr. Hudyma insisted that was not the  
25   case. It was not what was agreed to. They e-mailed back and  
26   forth about it. Ms. Clarke even provided her notes which she

1 thought surely showed she was right. She was not. After  
2 conferring with the mediator, Hudyma's recollection was correct,  
3 Ms. Clarke's was mistaken.

4 So, on the heels of this mistake on health insurance -- a  
5 mistake which Clarke states in her May 13th e-mail, "I talked to  
6 Rick in passing and I know he does not want to budge on the six  
7 month thing," so an issue important to Respondent. On the heels  
8 of that mistake, Ms. Clarke realized that they had made another  
9 mistake by not discussing and not including the letter of  
10 agreement in the contract. Therefore, when she realized it was  
11 -- that there was a letter of agreement, she changed it and  
12 submitted it to the board without notifying the union. For the  
13 first time since negotiations started in March, she gave the  
14 union a copy of the contract which now included a letter of  
15 agreement which the union saw for the very first time in June.

16 Respondent makes much of the fact that the letter of  
17 agreement in 2001 was bought. That is, that paragraph 5 which  
18 modifies Section 1.1(b) was agreed to by the union in exchange  
19 for increased wages, yet during negotiations wages were  
20 renegotiated and they came to an agreement. At no time did they  
21 bring up the letter of agreement that included the wages and a  
22 modification of 1.1(b). As I had already discussed, they had no  
23 problem modifying the contract to include and incorporate other  
24 memorandums of understanding as they did with the seniority  
25 provision, but to not attempt to make this occur with 1.1(b) in  
26 a letter of agreement. The union even offered to -- in one of

1 its proposal proposed changing 1.1(b). Respondent rejected it,  
2 but again did not bring up its modification as clarified in the  
3 letter of agreement for 2001. Respondent is  
4 sophisticated and has a great deal of experience in  
5 negotiations. It had every opportunity to bring up the letter  
6 of agreement during negotiations, but neglected to do so. When  
7 it realized its error, rather than bringing it to the attention  
8 of the union and requesting to continue to bargain, it simply  
9 tracked it up to a scrivener's error and hoped that the union  
10 would not notice. Of course the union did notice and rightly is  
11 refusing to sign the agreement with the letter of agreement  
12 attached to it.

13 In conclusion, General Counsel submits that Hudyma should  
14 be credited and therefore there should be a finding made that  
15 the letter of agreement was not discussed during negotiation and  
16 is not part of the contract. Respondent should be ordered to  
17 sign and execute the contract as negotiated without the letter  
18 of agreement. That concludes my closing statement.

19 JUDGE VANDEVENTER: Thank you, Ms. Francis.

20 Mr. Weld?

21 MR. WELD: Thank you, Judge.

22 The Respondent starts off by indicating to the Judge that  
23 we believe there was an agreement which was reached at the May 1  
24 bargaining session. There was a meeting of the minds at that  
25 session. A meeting of the minds included the addition of the  
26 letter of agreement or the incorporation of the letter of

1 agreement which had been negotiated in 2001, and the continued  
2 attachment of that document into the collective bargaining  
3 agreement. What we have here we believe is a situation where we  
4 have an experienced negotiator exploiting the inexperience of  
5 our chief negotiator using a scrivener's error as an attempt to  
6 gain something that he viewed -- to correct something that he  
7 viewed as one of the two mistakes he has made in his life.

8 Kelly Clarke has testified that she makes mistakes. She  
9 admits she makes mistakes. The employer made a mistake in this  
10 case, Judge, in that its initial proposals -- General Counsel  
11 No. 4 all the way through the 2nd draft of the collective  
12 bargaining agreement, General Counsel No. 9, used the wrong  
13 computer file -- the 2002 contract as the base point for its  
14 proposals and the contract draft. In doing so, we fail to  
15 incorporate the 1998 contract changes and also the 2001 contract  
16 changes.

17 Now, in doing so, we don't think that it effected the union  
18 vote because Mr. Hudyma testified he didn't really give the  
19 employees the full contract. He gave them just the new  
20 language. So, the reference to the letter of understanding --  
21 letter of agreement was not incorporated in the information  
22 provided to the employees for their May ratification vote.

23

24 Yes, we made a mistake with the computer file by using our  
25 -- Ms. Clarke's predecessor's file, but that doesn't effect or  
26 change what happened at the May 1st bargaining session. And

1 what happened at that May 1st bargaining session was clear and  
2 reinforced not only by the circle -- circling of paragraph 5 in  
3 the discussions between Ms. Clarke and Mr. Hudyma, but also  
4 reinforced by the testimony of -- of both Mr. Hopkins and -- and  
5 Bill in terms of the -- what was discussed prior to the sidebar  
6 and the discussion following the sidebar in which the employer's  
7 bargaining team discussed prior to the meeting the need for the  
8 letter of agreement in light of what had happened at the  
9 Chippewa Falls store, and Ms. Clarke's reporting following the 3  
10 to 5 minute meeting of the fact that three things happened in  
11 the discussion.

12 One, she had even circled paragraph number 5 in the  
13 discussions with Dan and he indicated there wasn't a problem  
14 with them. He was only concerned about new addendums. He was  
15 concerned about a provision which arguably was contrary to a  
16 contract provision dealing with seniority, but because he had a  
17 migraine headache, wasn't able to deal with it and the parties  
18 agreed that that would be addressed in the future. All three  
19 employer's representatives testified to those conversations.

20 This is not a classic "he said/she said" case. This is a  
21 case in which Ms. Clarke's version of the discussion is  
22 reinforced by the document with the circle and by the  
23 discussions both before and after the discussion. Mr. Hudyma's  
24 version of the conversation is not credible. He testified  
25 himself that it is his legal conclusion that memorandums of  
26 agreement or understandings which are attached to the contract

1 die or evaporate at the end of the contract term. Despite that,  
2 he testified that relating to the three memorandums of  
3 understanding that were attached, one was incorporated in a  
4 union contract proposal and therefore didn't need to be added.  
5 The second, he simply ignored and the third he testified that  
6 there was an agreement that the memorandum -- at least in one of  
7 the four provisions in that memorandum, may have a -- conflicted  
8 with the seniority provision. But if his testimony is correct,  
9 the very existence of that memorandum conflicts with his -- his  
10 interpretation which is that the memorandums drop out or  
11 evaporate at the end of the contract term.

12 So in other words, what he is saying with the memorandum he  
13 ignored and with three of the four issues on the interpretive  
14 memorandum that he was willing to agree to continue those  
15 memorandums just as he was willing to agree to continue the  
16 memorandum -- or the letter of agreement which was negotiated in  
17 2001, and for which there was a considerable trade. Significant  
18 compensation in terms of wages which became effective in late  
19 2000 and again another increase in 2002. Those wages became the  
20 base point for the negotiations for the 2003 contract.

21 In other words, if Mr. Hudyma's interpretation is correct,  
22 the status quo ante -- the letter of agreement would be the  
23 wages which were incorporated in the '98, 2002 contract and  
24 which were not part of -- of the side letter or the agreement  
25 which was negotiated in 2001. Basically, he wants the part of  
26 the deal that favored the union and does not want to honor the

1 part of the deal that favored the employer -- and which part of  
2 the deal he specifically agreed to in the conversation on May 1.

3 In some ways, this is an interesting legal exercise because  
4 in the employer's view we are dealing with an illegal contract  
5 provision. As Mr. Hudyma has testified, he views 1.1(b) as an  
6 automatic situation in which we buy the store, and if it's in  
7 the geographic locality, they -- it becomes a unionized store.  
8 That is not the law, but it is the law as interpreted -- or as  
9 the current contract provides and indeed the employer fears that  
10 a grievance arbitrator is going to interpret 1.1(b) as Mr.  
11 Hudyma has testified he interprets it. Hence the reason for the  
12 2001 trade, we will give you additional wages in exchange for  
13 clarification that NLRA rules and law apply to any organization  
14 of a store no matter what the geographic area is.

15 I started off by saying there was a meeting of the minds.  
16 We believe that that meeting of the minds included the letter of  
17 agreement. However, there certainly was not an agreement or a  
18 meeting of the minds as far as a contract without the letter of  
19 agreement. In other words, we believe that the letter of  
20 agreement was properly brought to the table, it was discussed  
21 and it was agreed to in the sidebar conversation, but certainly  
22 there was never an agreement that there would be a contract  
23 without paragraph 5 of that letter of agreement continuing into  
24 the future.

25 Now, Counsel takes significance in the fact that in the  
26 June 2 draft of the contract we updated the letter of agreement



1 by changing the dates. That's all we changed were the dates.  
2 There was a reference to a 2000 wage rate. There was a  
3 reference to a 2002 wage rate. Those obviously had to be  
4 removed from the contract -- or the letter of agreement and --  
5 and tied to the agreement for the 2003/2006 period. There was  
6 no substantive change made to that letter of agreement. It was  
7 simply updated to reflect that change.

8 Counsel also seems to take significance in the fact that  
9 the memorandums of understanding are not date specific. Well,  
10 neither was the letter of agreement except for the reference to  
11 the wages. It is our belief that paragraph 5 of the letter of  
12 agreement must continue into the future. That was what the  
13 parties discussed and Ms. Clarke admits to making an error in  
14 terms of the computer file, but she also has been very clear and  
15 very distinct and very credible in terms of what happened in the  
16 conversation between herself and Hudyma, and her version is  
17 reinforced by the circled document as well as discussions both  
18 immediately prior and immediately following the sidebar  
19 conversation.

20 This is a credibility case and the Judge is being asked to  
21 say that the employer violated the law as a result of a -- of a  
22 credibility determination. We don't believe the Counsel for the  
23 Region has met its burden of proof here in making that type of a  
24 declaration regarding the Respondent and we ask the Judge to  
25 dismiss the complaint.

26 MS. FRANCIS: Your Honor, I move to strike the portion of

1 Respondent's closing argument in which he attributes to Mr.  
2 Hudyma testimony to the effect -- to the effect that Hudyma said  
3 inclusion is automatic under the contract. That was not --  
4 that's -- the facts and testimony not in evidence by Hudyma, it  
5 was in evidence by Respondent's witnesses.

6 JUDGE VANDEVENTER: Don't worry about it. That is not real  
7 essential to this case that particular remark, so I am not going  
8 to.

9 I don't have the transcript in front of me right now, so I  
10 don't know if it's exact or not but that's not going to be a  
11 material fact in this -- in this resolution of these issues.  
12 You know, this is a very interesting case -- short though it is,  
13 and I have appreciated the arguments of both counsel. Is there  
14 -- does anybody have -- you may argue in reply if you wish and  
15 so may counsel for the Respondent. Is there anything either  
16 party wants to add?

17 MS. FRANCIS: Can I have just one second?

18 JUDGE VANDEVENTER: You may. You have 2 minutes.

19 Off the record.

20 (Brief recess taken.)

21 JUDGE VANDEVENTER: On the record.

22 MS. FRANCIS: Just for the record -- or not just for the  
23 record actually. The Union and General Counsel -- the Union has  
24 indicated that it is still willing to withdraw the charge and  
25 complaints if Respondent were to sign the contract without the  
26 letter of agreement. And as we discussed in negotiations, is

1 even willing to allow 1.1(b) to be amended to include language  
2 at the end saying, "In accordance with the NLRA," therefore  
3 making clear that NLRA does not allow automatic recognition --  
4 you still need the majority, which is something that we had  
5 discussed extensively. So, just to be clear, that is something  
6 that the Union is still willing to accept.

7 JUDGE VANDEVENTER: Anything from you, Mr. Weld?

8 MR. WELD: Nothing on that, Judge. I guess we do cite for  
9 the Judge a series of cases in which where the contract draft  
10 does not reflect the agreement. The Board has consistently  
11 chosen to say there was no meeting of the minds. I guess we can  
12 deal with that if the court goes in that direction, but --

13 JUDGE VANDEVENTER: I prefer to deal with it now --

14 MR. WELD: Okay. The --

15 JUDGE VANDEVENTER: -- actually, Mr. Weld.

16 MR. WELD: Okay. The cite is Teamsters Local 287, Judge,  
17 272 NLRB 348, the union prepared a contract, attached an  
18 addendum, submitted it to the employer, the employer detached  
19 the addendum, returned it to the union, the union refused to  
20 sign the contract, the employer filed a charge, Board held no  
21 meeting of the minds had occurred and secondly commented that if  
22 an agreement was reached, it was appropriate to rescind the  
23 agreement because a mistake had occurred. There clearly had  
24 been --

25 JUDGE VANDEVENTER: And what did they call that? A  
26 unilateral mistake or mutual?

1           MR. WELD: I believe it was a mutual mistake arguing that  
2 enforcement against the mistaken party would be oppressive and  
3 result in a hardship or an unequal exchange. Similarly, in  
4 Walden, 282 NLRB 583, Board found that in a situation where a  
5 verbal wage proposal was made then put into a draft, the draft  
6 was revised by the employer, and an error was discovered in the  
7 schedule. When it was called to the employer's attention by the  
8 -- by the comptroller, the Board found that the employer did not  
9 violate the Act by repudiating a new contract because there were no  
10 meeting of the mind concerning the contract's wage schedule.  
11 The membership ratified a different contract proposal from that  
12 which had been offered by the employer resulting in a mutual  
13 mistake over an essential element.

14           In Mary Bridge Children's Hospital, 305 NLRB 270 -- I'm  
15 sorry, 570, there was a formula calculating second shift  
16 bonuses. The employer discovered a mistake in the formula,  
17 advised the union and made it a correction to the contract. The  
18 union took the position that the employer was bound by the  
19 original formula. The Board said, "No, not enforceable."

20           And finally, in Carpenter's Local 1473 -- it's 270 NLRB  
21 1432, the union unknowingly deleted a clause from a draft of  
22 the contract which the parties reviewed and signed, and then  
23 they discovered the omission and they requested that the  
24 employer bargain over the omitted clause. The Board concluded  
25 that it was proper to rescind the agreement based on a -- on the  
26 mistake made. The employer knew or should have known of the

1 mistake as a result in it receiving a significant new benefit.  
2 As such, there was no agreement on the issue and the -- and the  
3 employer did not violate the Act by not bargaining over the  
4 omitted change.

5 JUDGE VANDEVENTER: How does that apply to this case, Mr.  
6 Weld? Is this a mutual mistake? Unilateral mistake? What?

7 MR. WELD: Well, Judge, as we said -- or said in our  
8 statement. We believe there was an agreement, but certainly the  
9 employer did not agree to a contract without that letter of  
10 agreement in it and we believe that -- as we said in the -- in  
11 the statement, that this is a -- an experienced union negotiator  
12 using our scrivener's error as a way of negotiating or putting  
13 into the contract something which had not been agreed to.

14 JUDGE VANDEVENTER: All right, tell me what category it  
15 falls into? I mean, there is a different -- a different outcome  
16 for a mutual mistake and unilateral mistake as you are well  
17 aware in contract law. What category does this case belong in  
18 if -- under your theory?

19 MR. WELD: Under my theory --

20 JUDGE VANDEVENTER: I mean, whose -- was there a mutual  
21 mistake or was there a unilateral mistake? It was unilateral,  
22 whose was it? That's what I want you to apply that law to the  
23 facts.

24 MR. WELD: Okay. Our view, Judge, is that -- as I said,  
25 there was an agreement that was reached and it included the  
26 letter of understanding -- or letter of agreement as part of

1 that -- that agreement, so to that extent we do not believe  
2 there was a mistake. However, there certainly was no meeting of  
3 the minds if the -- to the union's position that the employer  
4 agreed to the letter of agreement being excluded from the  
5 contract.

6 JUDGE VANDEVENTER: All right. All right. Let me get your  
7 argument structured then -- and you are saying assuming that Mr.  
8 Hudyma is credited, there is no meeting of the minds?

9 MR. WELD: Correct.

10 JUDGE VANDEVENTER: Is that what you're saying?

11 MR. WELD: Correct.

12 JUDGE VANDEVENTER: I will give you a crack at that, Ms.  
13 Francis, because this is a new argument and we're going  
14 somewhere else, so you can -- you can respond to that theory.

15 MS. FRANCIS: I would say that there -- the General Counsel  
16 submits that there was a meeting of the minds and that there was  
17 a contract. It was the contract that does not include the  
18 letter of agreement. It was not discussed during negotiations.  
19 If there was a mistake, it was a unilateral mistake. A  
20 unilateral mistake on the part of the employer. And under Board  
21 law in Apache Powder Company, 223 NLRB 191, a unilateral mistake  
22 must be so patent and obvious that the other party is put on  
23 notice of it to rescind the contract.

24 Here, if there was a mistake, it was a unilateral mistake  
25 and does not rise to that level and therefore they cannot  
26 rescind the contract based on that. They must sign the contract

1 as agreed whether they made a mistake or not.

2 JUDGE VANDEVENTER: Is that Apache Powder you quoted to me?

3 MS. FRANCIS: Yes, Apache Powder Company, 223 NLRB 191.

4 JUDGE VANDEVENTER: I remember it well.

5 I give you another shot, Mr. Weld?

6 MR. WELD: No, ma'am.

7 JUDGE VANDEVENTER: Thank you, parties. I especially  
8 appreciate your elucidation of the case law and its  
9 applicability to these facts, and I am going to take time to  
10 work through your arguments and apply them to the facts and  
11 there are extensive documents, so it's going to take me an hour  
12 and half I'm going to say.

13 So, we will resume at 3: 45 that makes it, and I think  
14 with any luck we'll be then concluded by the end of today.  
15 Thank you.

16 (Brief recess taken.)

17 JUDGE VANDEVENTER: On the record.

18 Okay. After considering the parties' arguments, I am ready  
19 to deliver a decision. As you all know, bench decisions are  
20 issued pursuant to the Board's rules and regulations  
21 102.35(a)(10) and under that regulation, the time for filing  
22 exceptions does not begin to run until the written version of  
23 this bench decision is issued which does usually take two or  
24 three weeks after the close today because of the necessity of  
25 getting the transcript and making sure that it's correct.

26 So, that is in the Rule, but I just thought I would mention

1 it on the record or for the benefit for the parties.

2 Is there anything else from anybody before I begin?

3 (No response.)

4 JUDGE VANDEVENTER: No? All right.

5

6

7

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

26



1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26

WALLS & WALLS  
12124 Hampshire Avenue North  
Champlin, Minnesota 55316  
(763) 422-8938

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26

WALLS & WALLS  
12124 Hampshire Avenue North  
Champlin, Minnesota 55316  
(763) 422-8938

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26

WALLS & WALLS  
12124 Hampshire Avenue North  
Champlin, Minnesota 55316  
(763) 422-8938

1

2

3

4

5

6

7

8

9

10

11

12

13

14

15

16

17

18

19

20

## BENCH DECISION

21

## STATEMENT OF THE CASE

22

23

24

25

26

Jane Vandeventer, Administrative Law Judge. This case was tried on September 30, 2003, in Eau Claire, Wisconsin. The complaint alleges Respondent violated Section 8(a)(5) of the Act and refused to bargain by conditioning its execution of an agreed upon collective bargaining agreement on the inclusion of

WALLS & WALLS  
12124 Hampshire Avenue North  
Champlin, Minnesota 55316  
(763) 422-8938

1 a letter of agreement not negotiated with the union. The  
2 Respondent has filed an answer denying the essential allegations  
3 in the complaint. After the conclusion of the hearing, the  
4 parties made oral arguments which I have considered.

5 Based on the testimony of the witnesses, including  
6 particularly my observation of their demeanor while testifying,  
7 the documentary evidence, and the entire record, I make the  
8 following

9 FINDINGS OF FACT

10 I. JURISDICTION

11 Respondent is a cooperative association with an office and  
12 place of business in Eau Claire, Wisconsin, where it is engaged  
13 in the operation of retail convenience and grocery stores.  
14 During a representative one-year period, Respondent has derived  
15 gross revenues in excess of 1 million dollars, and has purchased  
16 and received goods and services valued in excess of \$50,000  
17 directly from points outside of Wisconsin. Accordingly, I find,  
18 as Respondent admits, that it is an employer engaged in commerce  
19 within the meaning of Section 2(2), (6), and (7) of the Act.

20 The Charging Party, who I will also call the Union, is a  
21 labor organization within the meaning of Section (2)5 of the  
22 Act.

23 II. UNFAIR LABOR PRACTICES

24 A. The Facts

25 The Union represents Respondent's employees and has done so  
26 for more than 35 years. The Respondent has approximately 600

WALLS & WALLS  
12124 Hampshire Avenue North  
Champlin, Minnesota 55316  
(763) 422-8938

1

2

3 employees in the bargaining unit who work at 13 different  
4 facilities in Eau Claire County and adjoining Chippewa County.  
5 The parties' most recent collective bargaining agreement was  
6 effective from April 1, 1998 to March 31, 2003. I will refer to  
7 it throughout as the '98 agreement.

8 On the title page of the '98 agreement it reads, "Working  
9 and Wage Agreement, Supplement A - Hourly Rates, Memorandum of  
10 Understanding concerning employee scheduled hours. Memorandum  
11 of Understanding concerning non-bargaining unit employees in  
12 meat department." In addition to that heading, the parties,  
13 that is the Respondent and Union, are named, and also the dates  
14 of the effectiveness are set forth.

15 The three addenda named on the title page are included in  
16 the printed agreement as is a third memorandum of understanding.  
17 Instead of saying memorandum I am going to say MOU which  
18 signifies a memorandum or understanding. In addition, unless I  
19 state otherwise, all dates that I refer to will be in 2003. The  
20 third MOU which is not mentioned on the title page but is  
21 included in the printed booklet -- and by booklet, I mean an 8 ½  
22 by 5 ½ inch booklet in which the contract is printed. Now, the  
23 third MOU concerns "Interpretive Notes." None of the three MOUs  
24 concern operative dates and although each one is signed  
25 separately, there are no dates of execution opposite the  
26 signatures. And that refers to the three MOUs that I have

1

2 described as being in the '98 agreement.

3

4 In approximately mid contract of the last contract term,  
5 Respondent and the Union made a mid-term agreement. The Union  
6 secured a wage rate increase in return for agreeing that any new  
7 facilities opened in the two county area would not automatically  
8 be covered by the collective bargaining agreement, as had been  
9 the past practice. The dates of the '98 agreement were recited  
10 in the preamble of this mid- contract agreement. The mid  
11 contract agreement has been referred to in the record as the  
12 2001 letter of understanding, as it was executed on January 9th,  
13 2001. I will refer to it as the 2001 letter of agreement.

14

15 The new wage rates were to be effective for the final 2 1/4  
16 years of the collective bargaining agreement. The signers for  
17 the Respondent and the Union both dated their signatures January  
18 9th, 2001. Respondent witnesses testified that they added a  
19 copy of the 2001 letter of agreement to their bargaining  
20 notebooks in which they maintained the collective bargaining  
21 agreement. Apparently their notebook was 8 1/2 by 11 1/2 inches. It  
22 was identical to the booklet containing the '98 agreement,  
23 except for the 2001 letter of understanding.

24

25 In March of 2003, the parties began to negotiate for a new  
26 agreement as the '98 agreement was due to expire soon. There  
27 were four sessions and they were held on March 14, March 19,  
28 April 10 and May 1. The latter two bargaining sessions included  
29 the participation of a Federal mediator. At the first session,

1

2 each party made a proposal. Those are in writing and they are  
3 in evidence. Neither of these proposals included the 2001  
4 letter of agreement, nor any of the three MOUs which had been  
5 appended to the '98 agreement. The Union's proposal included a  
6 clause in the recognition article which automatically extended  
7 recognition to new or relocated operations. This provision was  
8 later dropped by the Union.

9 At the first sessions it is undisputed that Daniel Hudyma,  
10 president and chief negotiator for the union, referred to the  
11 2001 letter of agreement as a mistake he had made. According to  
12 Hudyma, that was the only specific reference to the 2001 letter  
13 of agreement during the entire four negotiating sessions.  
14 Respondent's witness and chief negotiator Kelly Clarke's  
15 testimony differed. I will reach that incident and that  
16 testimony later on. There is no dispute that no specific  
17 reference was made to the 2001 letter of agreement on either the  
18 March 19th session or the April 10th session. On April 10th,  
19 the mediator advised the parties that they should narrow their  
20 issues to five major ones and the parties did so. Therefore, on  
21 May 1st each party was by itself in separate caucus rooms and  
22 the mediator shuttled between the two caucus rooms carrying  
23 proposals between the parties. After the exchange of the  
24 proposals through the mediator in this manner, the parties  
25 arrived at agreement on the five major issues that they had set  
26 forth.



1  
2       It is undisputed that at the time the Union accepted the  
3 employer's last proposal, the mediator informed the Respondent  
4 that the Union had a problem with the addenda to the collective  
5 bargaining agreement. The mediator told the Respondent's caucus  
6 that he was unable to say what the Union's problem was. Clarke  
7 and Hudyma had a short conversation outside the caucus room. No  
8 other persons were present. I will canvas the testimony of each  
9 witness. Hudyma testified that he told Clarke the Union didn't  
10 want any more "interpretive notes" such as the MOU on page 25 of  
11 the '98 agreement, and he had a concern that part of that MOU  
12 conflicted with the seniority language the parties had just  
13 worked out. Clarke agreed that the new seniority language would  
14 govern and supersede anything inconsistent which existed in the  
15 MOU that appears on page 25 of the '98 agreement. Hudyma  
16 further testified that no other MOUs were specifically discussed  
17 at all. He noticed that Clarke had her three-ring binder opened  
18 to the MOU that appears on page 25 of the '98 agreement. That  
19 is the one that refers to interpretive notes. Hudyma also  
20 testified that Clarke did not write or circle anything in the  
21 notebook while they were talking.

22       I will turn now to Clarke's testimony. She had been the  
23 human resources director for only about six months of the time  
24 of the negotiation. She was the chief negotiator. Clarke  
25 testified that when the mediator informed the Respondent's team  
26 that the Union wanted to discuss the addenda, she and her team

1  
2 wanted to know what it was about but the mediator did not know.  
3 It is undisputed that they discussed among themselves the  
4 importance to the Respondent of one paragraph of the 2001 letter  
5 of agreement, that is paragraph 5. Clarke testified she then  
6 had a brief conversation with Hudyma outside the caucus rooms.  
7 Clarke asked Hudyma if he had a problem with the current MOUs or  
8 new MOUs and opened her notebook and pointed to paragraph 5 of  
9 the 2001 letter of agreement. She testified that Hudyma said  
10 that that wasn't the MOU he had a problem with, but certain  
11 language in the interpretive notes MOU on page 25 conflicted  
12 with the new seniority language. Clarke testified that she  
13 agreed with Hudyma that if there was inconsistent language, the  
14 new seniority language would govern. Clarke returned to the  
15 Respondent's caucus where according to team member Bill Ripley,  
16 she reported that the Union had no problem with the existing  
17 addenda but didn't want new ones added. Ripley's notes  
18 corroborate that Clarke reported the union wanted "no more new  
19 addendums." Hopkins testified Clarke also told him she circled  
20 paragraph 5 on the 2001 letter of agreement as she spoke with  
21 Hudyma, but as Hopkins contradicted himself to a certain extent  
22 on that point in his prior affidavit, I do not credit him on  
23 that point.

24 After May 1st, Clarke began to incorporate the negotiated  
25 changes into a draft. She admits she erred by using an outdated  
26 computer file and the draft she forwarded to Hudyma on May 9th

1 contained several errors which Hudyma pointed out. A second  
2 draft authored by Clarke on May 14 corrected some errors, but  
3 still contained other errors. Between May 9th and May 19th,  
4 Clarke and Hudyma exchanged approximately 17 e-mail messages  
5 concerning the corrections to the draft. One disagreement  
6 concerned whether 6 weeks or 6 months had been the time agreed  
7 as the new employee waiting period for insurance eligibility.  
8 After several exchange of e-mails on the issue, the mediator was  
9 appealed to and his recollection was accepted. Both Clarke's  
10 recollection and her bargaining notes were in error on this  
11 point according to what the parties then agreed to.

12 It is undisputed that the two drafts, May 9 and May 14,  
13 both contain the same language on the title page, and that is  
14 identical to the wording on the title page of the '98 agreement  
15 that I read earlier, and again as in the '98 agreement, both the  
16 parties are named and the duration of the contract is noted.  
17 Both the May 9 and May 14 drafts also contain the same MOUs  
18 which had existed in the prior contract but neither contains the  
19 2001 letter of agreement.

20 Subsequent to May 14, Hudyma reminded Clarke that the MOU  
21 on seniority was now included in the contract language itself  
22 and therefore should be deleted from the addenda. Clarke agreed  
23 to make that change and did so. At some point between May 22nd  
24 and May 28th, according to Clarke, she realized that she had  
25 made another mistake that of not including the 2001 letter of  
26 agreement in the addenda. Her memory of this was vague. At

1 first she stated that she didn't remember when she had realized  
2 this and later her recollection was narrowed to some time  
3 between May 22nd and May 28th.

4 On May 22, Hudyma presented the new agreement to the  
5 membership for ratification. He did not present any particular  
6 document, as none had been finalized, but instead described the  
7 changes and the membership ratified the collective bargaining  
8 agreement as described to the membership by Mr. Hudyma.

9 After discovering that she had neglected to include the  
10 2001 letter of agreement in any of the written versions of of  
11 the contract, Ms. Clarke found a copy of the letter of  
12 agreement, deleted one paragraph which she believed was  
13 irrelevant, changed all the dates in the 2001 letter of  
14 agreement to reflect the appropriate and the corresponding time  
15 periods between 2003 and 2006, and new contract term, and added  
16 this revised letter of agreement to the collective bargaining  
17 agreement which she submitted as the 3rd draft of the agreement.  
18 This 3rd draft was submitted to Respondent's board of directors  
19 on May 28th. Sometime after May 28th, Ms. Clarke did not  
20 remember when, she mailed it to Hudyma and he first saw it on  
21 June 2nd.

22 Clarke first testified that she called Hudyma and told him  
23 about neglecting to put the letter of agreement on the draft,  
24 but didn't remember what he said in response. Then Clarke  
25 changed her testimony and said she thought Hudyma had called her  
26 about it first. And finally, she stated that she had simply

1 mailed him a copy of the 3rd draft after May 28th and that  
2 thereafter he had called her and sent her e-mails protesting her  
3 addition of the new letter of agreement to the 3rd draft.

4 Both parties believed on May 1st that they had a contract.  
5 Both parties contend that there was a meeting of the minds on  
6 that date. However, the General Counsel and the Charging Party  
7 contend that the agreement reached did not include the 2001  
8 letter of agreement, either as it existed or with its modified  
9 dates. The Respondent contends that the agreement reached did  
10 include the 2001 letter of agreement with altered dates being  
11 the logical corollary. This is the only point of difference  
12 between the parties as to what was agreed on May 1st.

13 CREDIBILITY

14 It is first necessary to determine what was said between  
15 Hudyma and Clarke on May 1st. There is no dispute as to certain  
16 of those remarks. There is no dispute that Hudyma stated there  
17 might be inconsistent language in MOU on page 25 of the '98  
18 agreement, and that both parties agreed that the seniority  
19 language they had just negotiated would govern if there was any  
20 inconsistency. There was also agreement that Hudyma said the  
21 Union didn't want any new addenda to this collective bargaining  
22 agreement.

23 I credit Clarke as indirectly corroborated by Ripley to the  
24 effect that Hudyma said he had no problem with existing addenda,  
25 but I credit Hudyma's testimony that no specific MOUs or addenda  
26 were discussed other than the MOU on page 25 of the '98

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26

agreement. I specifically discredit Clarke's assertion that she mentioned the 2001 letter of agreement and pointed out paragraph 5 to Hudyma during this conversation.

My reasons for crediting Hudyma over Clarke on this point are partly based on her testimony demonstrating poor memory. Her testimony was vague at times. There were frequent changes in her testimony and an inability to recall the sequence or dates of important matters in this case, and her confession of frequent errors, both of memory and of recordation. One particular example of an error of memory concerned the 6 week versus 6 month controversy which was resolved by the parties during May during the correcting the draft process.

It appears from the testimony of all the Respondent's witnesses, to the extent they thought it through, that the term "existing MOUs" included the 2001 letter of agreement. It is also clear that Hudyma equally sincerely thought that existing MOUs or existing addenda did not include the 2001 letter of agreement. One of the problems appears to have been that the parties used the term "existing" without specifying exactly and precisely what it meant.

By its terms, the 2001 letter of agreement expired when the old collective bargaining agreement expired.

1 Obviously the rest of the 2001 letter of agreement totally  
2 changed because all the wage rates were renegotiated. Paragraph  
3 5 alone was still left hanging. If Respondent had wanted to  
4 make paragraph 5 a permanent part of the new agreement, it could  
5 have brought it up in any of the four meetings, it could have  
6 drafted language to be included in the new collective bargaining  
7 agreement itself, or at a minimum, included the 2001 letter of  
8 agreement among its proposals.

9       If there was an error in not including this agreement, the  
10 2001 letter of agreement or comparable language, Respondent  
11 could or should have raised it to the union during the  
12 bargaining sessions and if they discovered the error thereafter,  
13 raised it during any of the frequent communication that occurred  
14 for 4 weeks following May 1st concerning the correct contract  
15 draft which was in progress. It doesn't really matter if it was  
16 a matter of oversight or ignorance, it was not raised, it was  
17 not part of the negotiations and it was not part of the  
18 agreement.

19       If Respondent actually did believe -- which it may have --  
20 that the 2001 letter of agreement continued to be included even  
21 though it had never been included in any of the written material  
22 exchanged, it was a unilateral mistake on Respondent's part and  
23 not a mutual mistake. Respondent did not take its many  
24 opportunities to raise the issue specifically, and even in 4  
25 weeks of preparing drafts did not include it. There is an old  
26 contract rule that would resolve doubts against the drafter and

1 that would favor the union, the government's position in this  
2 case that in fact the letter of agreement should not be a term  
3 and was not a term of the agreement reached on May 1st.

4 Because of the fact that if there was a mistake, it was a  
5 unilateral one, this case then is governed by Apache Powder. In  
6 fact, I find that agreement did exist on May 1st and that it did  
7 not include the 2001 letter of agreement. While I base this  
8 finding partly on the testimony concerning the May 1st one on  
9 one conversation between Mr. Hudyma and Ms. Clarke, I rely even  
10 more heavily on Respondent's own documents, both those from  
11 before May 1st as well as the drafts and e-mails from the  
12 ensuing month and all the documents after May 1st. They really  
13 included at least 6 weeks worth of documents.

14 And as the Board has reminded us on many occasions, the  
15 parties must write down and sign an agreement if they reach one.  
16 They can't back out or change once a deal has been struck. That  
17 is Apache Powder. The citation is 223 NLRB 191, and recent  
18 cases which follow Apache Powder and actually bear on our case  
19 are E-Systems, 318 NLRB 104, in which some language was altered  
20 by the employer after the agreement was made. That has  
21 similarity to one aspect of this case. Another recent case is  
22 Alexandria Manor, 317 NLRB 2. In that case the employer refused  
23 to sign a collective bargaining agreement contending that three  
24 side letters were not attached. The Board found that the  
25 employer had agreed to sign the agreement as it existed and it  
26 was an unfair labor practice for it to refuse to do so after the



1

2

3

4

5 agreement had been made. Both of these cases are apposite to  
6 the case before us.

7

8 I do not believe there has been bad faith in this case. In  
9 the arguments there have been some implications that the other  
10 party may have been trying to back door something. I sincerely  
11 don't believe that was the case. Ill motives may be responsible  
12 for some disputes, but also mistakes, unwarranted assumptions,  
13 and misunderstandings can generate problems. So, I really find  
14 the ill motives are quite irrelevant to my finding and I believe  
15 to the issues in this case. And I also recognize that it is not  
16 always easy to tell the mutual mistake from unilateral mistake,  
17 but I believe that the facts in this case, heavily relying on  
18 the documents support the findings of fact I have made and the  
19 conclusions I have drawn.

20

#### CONCLUSIONS OF LAW

21

22 1. By refusing to sign an agreed upon collective  
23 bargaining agreement without the addition of an additional  
24 letter of agreement, the Respondent has violated Section 8(a)(5)  
25 and (1) of the Act.

26

27 2. The violation set forth above is an unfair labor  
28 practice affecting commerce within the meaning of the Act.

29

#### REMEDY

WALLS & WALLS  
12124 Hampshire Avenue North  
Champlin, Minnesota 55316  
(763) 422-8938

5        On these findings of fact and conclusions of law and on the  
6        entire record, I issue the following recommended order.

7	ORDER
---	-------

8       The Respondent, Consumer's Cooperative Association of Eau  
9       Claire, its officers, agents, successors, and assigns shall:

10           1.   Cease and desist from:

11 (a) Refusing to bargain by refusing to execute an agreed  
12 upon collective bargaining agreement without attaching an  
13 additional letter of agreement to the agreement;

14 (b) In any like or related manner interfering with  
15 restraining or coercing employees in the exercise of rights  
16 guaranteed them by Section 7 of the Act.

17           2.    Take the following affirmative action necessary to  
18   effectuate the policies of the Act:

19           (a) Sign the agreement previously agreed to in collective  
20 bargaining with the Union;

(b) Within 14 days after service by the Region, post at its Eau Claire and Chippewa County locations copies of a notice which will be attached to the written version of this decision. Copies of the notice on forms provided by the Regional Director over Region 18 after being signed by the Respondent's authorized representative shall be posted by the Respondent and maintained

WALLS & WALLS  
12124 Hampshire Avenue North  
Champlin, Minnesota 55316  
(763) 422-8938

1

2

3 for 60 consecutive days in conspicuous places including all  
4 places where notices to employees are customarily posted.

5 Reasonable steps shall be taken by the Respondent to ensure that  
6 the notices are not altered, defaced, or covered by any other  
7 material. In the event that during the pendency of these  
8 proceedings the Respondent has gone out of business or closed  
9 the facility involved in these proceedings, the Respondent shall  
10 duplicate and mail at its own expense, a copy of the notice to  
11 all current employees and former employees employed by the  
12 Respondent at any time since June 2nd, 2003.

13 (c) Within 21 days after service by the Region, file with  
14 the Regional Director a sworn certification of a responsible  
15 official on a form provided by the Region attesting to the steps  
16 that the Respondent had taken to comply.

17 That ends the decision.

18 Does any party have anything further?

19 (No response.)

20 JUDGE VANDEVENTER: No?

21 Thank you for your participation in this proceeding.

22 The hearing will be closed.

23 (Whereupon, at 4:20 p.m., the hearing was concluded.)

24

C E R T I F I C A T E

This is to certify that the attached proceedings  
 before the NATIONAL LABOR RELATIONS BOARD, REGION EIGHTEEN  
 Case No. 18-CA-16902

In the Matter of: )  
 )  
 CONSUMER'S COOPERATIVE ASSOCIATION )  
 OF EAU CLAIRE, )  
 )  
 Respondent, )  
 )  
 and )  
 )  
 UNITED FOOD AND COMMERCIAL )  
 WORKERS #12A, A/W UNITED FOOD AND )  
 COMMERCIAL WORKERS INTERNATIONAL )  
 UNION, )  
 )  
 Charging Party. )

Date: September 30, 2003

Place: Eau Claire, Wisconsin

were held according to the record, and that this is the  
 original, complete, true and accurate transcript which has  
 been compared to the reporting or recording accomplished at  
 the hearing, that the exhibit files have been checked for  
 completeness and no exhibits received in evidence or in the  
 rejected exhibit file are missing.

\_\_\_\_\_  
 Ronald W. Walls  
 Official Reporter

WALLS & WALLS  
 12124 Hampshire Avenue North  
 Champlin, Minnesota 55316  
 (763) 422-8938